UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE CLIFFORD A. ANDERSON

AMPERSAND PUBLISHING, LLC	)	**CASE NOS. 31-CA-28589**
D/B/A *SANTA BARBARA NEWS-PRESS*	)	**31-CA-28661**
	)	**31-CA-28667**
EMPLOYER,	)	**31-CA-28700**
	)	**31-CA-28733**
	)	**31-CA-28734**
AND	)	**31-CA-28738**
	)	**31-CA-28799**
	)	**31-CA-28889**
	)	**31-CA-28890**
GRAPHIC COMMUNICATIONS	)	**31-CA-28944**
CONFERENCE/INTERNATIONAL	)	**31-CA-29032**
BROTHERHOOD OF TEAMSTERS	)	**31-CA-29076**
	)	**31-CA-29099**
UNION.	)	**31-CA-29124**
	)	

BRIEF IN SUPPORT OF EXCEPTIONS SUBMITTED ON BEHALF OF RESPONDENT AMPERSAND PUBLISHING, LLC D/B/A *SANTA BARBARA NEWS-PRESS*

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COMES NOW, Ampersand Publishing, LLC d/b/a *Santa Barbara News-Press* ("the *News-Press*"), the Respondent, pursuant to Section102.46 of the National Labor Relations Board's ("the Board" or "NLRB") Rules and Regulations, Series 8, as amended, with this Brief in Support of Exceptions to the May 28, 2010 Decision and Recommended Order of Administrative Law Judge ("ALJ") Clifford Anderson in NLRB Case No. 31-CA-28589 et al.

ISSUES INVOLVED AND TO BE ARGUED

The allegations will be grouped by theme for ease of analysis. As a result, each theme contains its own recitation of facts and analysis. The Issues Involved and to Be Argued are:

1. Whether the ALJ's Conclusions of Law, Remedies and Recommended Order were based in fact and law?

   Primary Exceptions on this issue are Respondent's Exceptions: 1-23.

2. Whether the ALJ's recitation of "background" facts and credibility determinations were based on substantial evidence as a whole?

   Primary Exceptions on this issue are Respondent's Exceptions: 24-47.

3. Whether the *News-Press* violated Sections 8(a)(1), (3), and (5) of the Act through its use of temporary employees?

   Primary Exceptions on this issue are Respondent's Exceptions: 48-82.

4. Whether the *News-Press* violated Sections 8(a)(1) and (5) of the Act in responding to GCC/IBT's information requests?

   Primary Exceptions on this issue are Respondent's Exceptions: 83-121.

5. Whether the *News-Press* violated Sections 8(a)(1) and (5) of the Act by laying off employee Richard Mineards?

   Primary Exceptions on this issue are Respondent's Exceptions: 122-133.

6. Whether the *News-Press* violated Sections 8(a)(1)(3), and (5) of the Act through the use of Freelance writer Robert Eringer?

   Primary Exceptions on this issue are Respondent's Exceptions: 134-146.

7. Whether an August 22, 2008 letter from Co-Publisher Mrs. Wendy McCaw violated Section 8(a)(1) of the Act?

   Primary Exceptions on this issue are Respondent's Exceptions: 147-158.

8. Whether the *News-Press* violated Sections 8(a)(1), (3), and (5) of the Act during a newsroom meeting on December 3, 2008, where a new manager gave employees a "pep rally" to encourage employee productivity and asked employees to consider the information presented about how the *News-Press* intended to allocate resources a "trade secret" so that the *News-Press* would maintain a competitive advantage over its competitors?

   Primary Exceptions on this issue are Respondent's Exceptions: 159-175.

9. Whether the *News-Press* violated Sections 8(a)(1) and (5) of the Act by maintaining the status quo for 2008 performance evaluations.

   Primary Exceptions on this issue are Respondent's Exceptions: 176-181.

10. Whether the *News-Press* violated Sections 8(a)(1) and (5) of the Act for maintaining the status quo with respect to wage increases in 2007, 2008, and 2009?

    Primary Exceptions on this issue are Respondent's Exceptions: 182-194.

11. Whether the *News-Press* violates Sections 8(a)(1), (3), and (5) of the Act by initially suspending, then ultimately discharging employee Dennis Moran?

    Primary Exceptions on this issue are Respondent's Exceptions: 195-231.

12. Whether the *News-Press* violated Sections 8(a)(1) and (5) of the Act by "insisting on management rights, grievance and arbitration, union bulletin board, and discipline proposals that were predictably unacceptable to GCC/IBT?"

    Primary Exceptions on this issue are Respondent's Exceptions: 232-253.

13. Whether the *News-Press* violated Sections 8(a)(1) and (5) of the Act by "insisting as a condition of reaching an agreement with GCC/IBT that GCC/IBT agree to a management rights clause that would grant the [*News-Press*] unilateral control over many terms and conditions of employment?"

    Primary Exceptions on this issue are Respondent's Exceptions: 232, 252-259.

14. Whether the *News-Press* violated Sections 8(a)(1) and (5) of the Act by bargaining in good faith with GCC/IBT despite GCC/IBT's bad faith bargaining?

    Primary Exceptions on this issue are Respondent's Exceptions: 232-259.

ARGUMENT

I. THE HISTORY OF THE LABOR DISPUTE

The history of GCC/IBT's organizing the *News-Press* newsroom is not one about wages, hours and working conditions. Instead, the *News-Press* was, and continues to be, subjected to a systematic attempt by GCC/IBT to wrest away the publisher's right to control the content of the *News-Press*. (Tr. 2161). This truth should be recognized when evaluating this case.

GCC/IBT's entire purpose of organizing the newsroom was to take control of the news because GCC/IBT supporters disagreed with publisher Wendy McCaw: "The old SBNP has been destroyed by a grossly incompetent and tyrannical owner." (RESP. 822). In fact, GCC/IBT's attitude, conveyed by one of its founding members, was "to help oust [Co-Publisher] Wendy [McCaw]…." (Tr. 304). The animosity toward Mrs. McCaw began when she pointed out, beginning in 2004 and before she became Co-Publisher, the bias that permeated the news the *News-Press* was publishing.

Instances of biased reporting persisted into 2005 and 2006, including complaints about the biased articles. (Tr. 2261-2266; RESP 983, 1001, 1005). In a 2005 survey of *News-Press* readers, 64% of *News-Press* readership had grave concerns about the credibility and biased reporting coming out of the *News-Press*. (Tr. 2274-2275; RESP 984). The consistent bias contained in the news lead to the demotion of the *News-Press's* publisher, Jerry Roberts, in 2005. (Tr. 2265). Ultimately, Mr. Roberts resigned in June or July 2006. (Tr. 333). Along with him, a number of other editors and reporters voluntarily resigned as well. (*Id.*).

On or about July 13, 2006, shortly after the resignations of Roberts and the other editors, Dawn Hobbs and Melinda Burns, among others, prepared and submitted a letter to Travis

Armstrong. (RESP 998). This letter made clear the true intent of GCC/IBT and its members in its first two demands:

> 1. Restore journalism ethics to the *Santa Barbara News-Press*: implement and maintain a clear separation between the opinion/business side of the paper and the news-gathering side;
>
> 2. Invite back the six newsroom editors who recently resigned: Jerry Roberts, newsroom editor; George Foulsham, managing editor; Don Murphy, deputy managing editor; Jane Hulse, city editor; Michael Todd, business editor and Gerry Spratt, sports editor.
>
> 3. Negotiate a contract with newsroom employees governing our hours, wages, benefits and working conditions.
>
> 4. Recognize the Graphic Communications Conference of the International Brotherhood of Teamsters as our exclusive bargaining representative.

(RESP 998).

For GCC/IBT and its supporters, the issues were not about wages, hours and working conditions. The issues were about controlling the content of the paper; who would control it (GCC/IBT and the former editors); and, more importantly, who would not control it (the owner Ms. Wendy McCaw). GCC/IBT attempted to take control from this point.

After GCC/IBT made its July 2006 demands to take control of the newspaper and rehire former employees (RESP 998), GCC/IBT organizer Marty Keegan and GCC/IBT lawyer Ira Gottlieb, appeared on a local radio show. (RESP 1105). GCC/IBT admitted to a naked attempt to take control of the content of the *News-Press*:

> The fact is that labor unions understand that the voice in those communities are the newspapers. And if we can't get stories about situations that arise in the paper, in the communities, into those newspapers, or we can't tell an opposite side of a story or for that matter present an opposition, a, a position, this is where the death or the, or the possible death of democracy starts.
>
> ***Santa Barbara, to me, is, is definitely the precedent that's going to set a tone for the rest of the country. This fight's huge, and we've got to continue.***

(RESP. 1105)(emphasis added). Keegan was not referring to a fight for wages, hours and working conditions. He referred to GCC/IBT's systematic attempt to take editorial control of the newspaper and give GCC/IBT, and its members and supporters, ***the voice*** of the *News-Press*. It

took the careful analysis of District Court Judge Stephen Wilson, affirmed by the Ninth Circuit, to see through GCC/IBT's efforts and call an apple an apple: that GCC/IBT's dispute was about control of the paper, and the NLRB's position violated the owner/publisher's First Amendment rights. (*See* RESP 162).

Even before GCC/IBT ever came to town, but certainly by the end of 2006, GCC/IBT's position was clear. "Oust" McCaw and "Don't let McCaw control the news." (RESP. 702). This was not only the backdrop, but is at the forefront in every decision and maneuver of GCC/IBT since 2006. This includes using Region 31 and the General Counsel as its willing tools to implement a paradigm shift in constitutional law and transfer the protections of the First Amendment freedom of the press from ownership and management to employees. Remember, as A.J. Liebling stated, "Freedom of the press is guaranteed only to those who own one." The ALJ ignored this singularly unconstitutional theme that should be considered relative to an analysis of this dispute.

II. ALLEGATIONS PERTAINING TO TEMPORARY EMPLOYEES

The *News-Press* had a rich history of using temporary employees, both directly hired temporary employees and temporary employees hired through agencies. This status quo existed before GCC/IBT entered the scene. GCC/IBT knew of the *News-Press*'s use of temporary employees. (Tr. 2050-53). GCC/IBT proposed a stipulated election agreement that excluded temporary employees (RESP. 737,738); the certification of the bargaining unit excluded temporary employees (RESP. 736); GCC/IBT's bargaining committee consisted of former temporary employees; and GCC/IBT's initial proposal proposed excluding temporary employees from the bargaining unit. (G.C. 18 at 11-12).

The ALJ acknowledged that the General Counsel did not prove its case by positing – with no record evidence – "there is no reason to conclude that [temporary employees] did less unit work than [the *News-Press*]'s unit employees on an hour-by-hour basis. Thus, I find that at all times between July 2007 and early 2009, significant amounts of work were being provided by nonunit employees." (ALJD 37:34-37). The ALJ created this finding of whole cloth. There was no record evidence to support the ALJ's conclusion; undeterred the ALJ created facts to support the conclusion. The General Counsel and GCC/IBT had the ability to subpoena documents and question witnesses; both parties made use of these abilities. The lack of any evidence to support this critical finding of the ALJ demonstrated the dearth of evidence upon which this finding was built. The finding should not stand and this critical aspect of the ALJ's decision should be overturned.

A. THE *NEWS-PRESS* HAD A PAST PRACTICE OF USING TEMPORARY EMPLOYEES

The *News-Press* had a past practice of using temporary employees in the newsroom. This practice was in effect since at least 2000. (G.C. 234;Tr. 544). Significantly, the *News-Press* used temporary employees on a temp-to-hire basis. (Tr. 573). That is, the ultimate hope was that the temporary employees would eventually become permanent employees. (Tr. 584). In this regard, the use of temporary employees was significantly different than that of the employer in *St. George's Warehouse*, 341 NLRB 904 (2004). Unlike the employer in *St. George's Warehouse,* the *News-Press* demonstrated that it had used temporary employees in a manner consistent with how it used employees subsequent to GCC/IBT winning the representation election. Furthermore, unlike the facts in *St. George's Warehouse,* the *News-Press* experienced an unprecedented amount of employee turnover – approximately 90 percent of the Newsroom turned over from June 2006 to January 2009. (ALJD 42:15-18; Tr. 547).

Furthermore, unlike the employer in *St. George's Warehouse*, the *News-Press* eventually hired the temporary employees employed by an agency. (Tr. 226-29, G.C. 116).

B. AN UNALTERED STATUS QUO COMPLIES WITH THE ACT

Where an employer's action does not change existing conditions – that is, where it does not alter the status quo – the employer does not violate Section 8(a)(5) and (1) of the Act. *See House of the Good Samaritan*, 268 NLRB 236, 237 (1983). An established past practice can become part of the status quo. *See NLRB v. Katz*, 369 U.S. 736, 740, 82 S. Ct. 1107, 1109, 8 L. Ed. 2d. (1962). Accordingly, the Board has not found a violation of Section 8(a)(5) and (1) where an employer simply followed a well established past practice. *See*, e.g., *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974).

When an employer has a past practice with regard to a mandatory subject of bargaining, then only must an employer bargain with a unit's representative when the employer intends to make a significant change. *See DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). If an employer, however, has an established past practice, then an employer is free to continue observing the practice without bargaining. *See Exxon Shipping Co.*, 2g, NLRB 489, 493 (1998).

In *Post-Tribune Co*., 337 NLRB 1279, 1280 (2002), the Board held that it was not a violation of the Act to unilaterally increase the amount deducted from employees' paychecks for health insurance coverage, in order to pass on to employees a portion of a premium increase imposed by the Respondent's insurance carrier, without giving the union notice and an opportunity to bargain. *See also Mt. Clemens Gen. Hosp.* 344 NLRB 450,460 (2005). (No violation of the Act where waiver can be inferred from undisputed evidence of past practice that a union never bargained over changes, nor objected to any changes.).

In *Courier-Journal*, 342 NLRB 1148 (2004), the Board concluded that the Company was entitled to make unilateral changes during the hiatus period between contracts due to past practice. *See* 342 NLRB at 1148. Significantly, the Board recognized that the company made changes on the same basis for bargaining unit employees and non-bargaining unit employees. *Id.*

C. THE STATUS QUO AT THE *NEWS-PRESS* WAS DYNAMIC AND SUSCEPTIBLE TO CHANGE BASED ON PAST PRACTICE AND UNIQUE CIRCUMSTANCES

A status quo is considered "dynamic" when it is susceptible to change based on the existing relationship of the parties. In *Ventura County Star Free Press*, 279 NLRB 412, 420 (1986), the Board adopted a dynamic status quo analysis in considering whether an employer had discontinued step wage increases after expiration of the CBA. In the instant case, there was no expired CBA, however, the principle remains the same: the status quo at the *News-Press* with respect to the use of temporary employees was dynamic.

In *Matheson Fast Freight, Inc*., 297 NLRB 63 (1989), the Board recognized a dynamic status quo and found no violation of the Act when an employer changed starting times after a union won an initial election. The Board stated: "… continuation of this past practice of making 'dynamic' economically-motivated changes in start times does not constitute an unlawful changes [sic] in terms and conditions in employment," *Id.* at 67. (citing Robert A. Gorman, *Basic Text on Labor Law of Unionization and Collective Bargaining*, West Publishing Co. (1977), page 400), for the proposition that:

> A so-called unilateral change in wages and working conditions is also usually condemned as per se illegal, although it is clear that such action is lawful when, for example, it is consistent with a 'dynamic' status quo, or is authorized by a collective bargaining agreement, or within a limited range of circumstances is required by statute).

In *Eastern Maine Med. Ctr. v. NLRB*, 658 F.2d 1, 21 (1st Cir. 1981), the court recognized that the dynamic status quo was correctly considered by the Board to find that an employer

violated the Act by denying a wage increase to newly organized employees while providing a wage increase to unrepresented employees. The Court of Appeals enforced the Board's order, stating in pertinent part: "During negotiations, the employer's obligation under *Katz* is to maintain the dynamic status quo…." *See also, Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1084-1085 (1st Cir. 1981), ("preserve the 'dynamic status quo,' consistently with past policies and practices" as one of several circumstances when unilateral employer action does not violate the Act.).

Similarly, any reliance on *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), is misplaced in the instant case. As the Board has long recognized, "our condemnation in *Fibreboard* and like cases of the unilateral subcontracting[1] of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved." *Westinghouse Electric Corp.*, 150 NLRB 1574, 1576 (1965). Accordingly, "it is wrong to assume that, in the absence of an existing contractual waiver, it is a *per se* unfair labor practice in all situations for an employer to let out unit work without consulting the unit bargaining representative." *Id*.

In cases where *Fibreboard* is the applicable rule, there is usually a significant change in a past practice, which is at the same time not a change in the scope and direction of the company's enterprise such as would obviate bargaining under *First National Maintenance v. NLRB*, 452 U.S. 666, 679 (1981). When a past practice is merely followed, however, the Board has held that there is no violation for failing to bargain over such a decision in itself even if it reduces job opportunities for bargaining unit employees. Specifically, in the subcontracting area, the Board has noted the importance of an employer's past practice:

[1] The General Counsel did ***not*** pursue an unlawful subcontracting theory in this case, either. The ALJ even invited the General Counsel to explain his theories as a subcontracting matter, but the General Counsel rejected such a categorization, instead terming it as the *News-Press* "taking unit work and shifting it outside of the unit" (Tr. 30-34).

> Here, however, there was no departure from the norm in the letting out of the thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with the Respondent's usual method of conducting its manufacturing operations at the Mansfield Plant. It does not appear that the subcontracting engaged in during the period in question materially varied in kind or degree from that which had been customary in the past.

Westinghouse Electric Corp., 150 NLRB 1574, 1576 (1965). Likewise, the *News-Press* did not depart from its past practice of using temporary employees in the newsroom. The *News-Press* used temporary employees, both from an agency and directly hired for many years, well before GCC/IBT entered the fray at the *News-Press*.

The *News-Press*'s use of temporary employees was not some elaborate scheme to undermine GCC/IBT or circumvent the Act. Rather, the *News-Press* used temporary employees employed by temporary agencies to address a severe shortage of employees – an unprecedented situation that severely challenged the resources of the small Human Resources Department of the *News-Press*. (Tr. 330). The *News-Press* was confronted with a very real personnel shortage and took reasonable, measured steps to address its staffing needs. The *News-Press*'s actions did not violate the Act.

D. THE GENERAL COUNSEL NEVER PROVED THAT "BARGAINING UNIT WORK" WAS TRANSFERRED TO TEMPORARY AGENCY-PROVIDED EMPLOYEES

The ALJ erroneously concluded that the General Counsel met the burden of proof regarding Paragraph 10 of the Amended Consolidated Complaint, which alleged that "the *News-Press* transferred bargaining unit work from the bargaining unit to temporary agency-provided employees." (G.C. 1(ffff)). There was no finding of what was "bargaining unit work?" Bargaining unit work would be, in theory, the work described in a CBA. However, there was no executed or expired CBA to define "bargaining unit work." The Amended Consolidated Complaint was drafted by the General Counsel; presumably, the General Counsel had evidence

to prove what constituted "bargaining unit work." The absence of any evidence pertaining to what constituted "bargaining unit work" mandated a finding that the *News-Press* did not violate the Act by transferring "bargaining unit work," as the term was never defined.

A final necessary provision of demonstrating that "bargaining unit work" – or really any work – was transferred from the bargaining unit to temporary agency-provided employees was evidence that employees in the bargaining unit actually lost work. There was no evidence to support this notion. In fact, the ALJ determined that the *News-Press* instituted an arbitrary and unprecedented productivity standard in order to have bargaining unit employees perform ***more*** work. (G.C. 1(ffff), Para. 16). Intellectually speaking, how can the *News-Press* have both decreased the amount of work performed by represented employees by transferring it to temporary agency-provided employees and ***demanded that bargaining unit employees perform more work***? The notion that the *News-Press* "transferred" any work to temporary agency-provided employees strained credulity.

III. ALLEGATIONS PERTAINING TO INFORMATION REQUESTS

The Complaint alleged that the response time for five discreet information requests violated the Act. (G.C. 1(ffff), Para 7(a) – (e)). These five discreet information requests failed to adequately reflect the totality of the voluminous information requests made by GCC/IBT of the *News-Press* since bargaining commenced. Over a 17-month span, GCC/IBT made 26 documented information requests, and the *News-Press* responded to each and every one. (RESP. 1060 (rejected); attached **Appendix 1**). The Amended Consolidated Complaint did ***not*** allege that the *News-Press* failed to respond to any information request; rather, the *News-Press* was only accused of not responding in a timely manner – a dubious charge, indeed.

The overall context of the five discreet information requests should be understood. While GCC/IBT and the General Counsel sought to focus on the proverbial tree, one must not lose sight

of the forest. Overall, and in the grand scheme of negotiations, the *News-Press* responded to each of GCC/IBT's information requests in a timely manner. These allegations should be dismissed.

A. GCC/IBT MAKES A WRITTEN INFORMATION REQUEST ON NOVEMBER 16, 2007

1. THE FACTS SURROUNDING THE NOVEMBER 16, 2007 INFORMATION REQUEST

On or about November 16, 2007, GCC/IBT made a written information request, seeking information regarding temporary employees. (G.C. Ex 21). This written information request came on the heels of three prior information requests. The first was GCC/IBT's 59-point written information request made on or about October 22, 2007. (G.C. 15). The *News-Press* acknowledged receipt of the 59-point request (G.C. 16), and on November 9, 2007, provided a partial response (G.C. 19). Furthermore, on November 13, 2007, at the first day of negotiations, the *News-Press* provided additional documents responsive to the 59-point request. (Tr. 2427). The information was so important to GCC/IBT that it left the stack of requested documents on a hotel lobby desk! (Tr. 2427).

At negotiations, on November 13, 2007, GCC/IBT verbally requested information regarding employees employed by temporary agencies. (Tr. 2430-32). The following day, November 14, 2007, the *News-Press* provided GCC/IBT with the information regarding temporary agency-provided temporary employees performing work at the *News-Press*. (Tr. 2431).

Later that day, at negotiations, GCC/IBT verbally requested the exact ending date for the year-to-date 2007 wage information for bargaining unit employees. On February 15, 2008, the *News-Press* responded, in writing. (Resp. 891). The 60-day lapse in providing information did not result in any unfair labor practice charge.

This background should be understood in the context of the November 16, 2007 written information request that sought additional information beyond what the *News-Press* had already provided at negotiations on November 14, 2007, in response to GCC/IBT's three previous requests, and the *News-Press*'s three previous responses. It was after this sequence of events that GCC/IBT sent its November 16, 2007 information request. (G.C. 21).

On November 30, 2007, the *News-Press* sent a letter to GCC/IBT stating, in relevant part:

> Let us put this in context. Information requested regarding the temporary employees was part of a very large, 59-point information request made by Mr. Caruso. *Santa Barbara News-Press* has, in large measure, responded to that information request. On November 14, 2007, we provided some specific information on the temporary employees which you acknowledged in your letter.
>
> Having some other questions about the temporaries, you began to ask them. I then asked that you also reduce those additional questions to writing so that there would not be any misunderstanding about just what was being requested, and you agreed to do so. You did not, at that time, ask that we provide you with any "rationale." You do ask that in your November 16, 2007 letter.
>
> Your information request arrived on November 16, 2007. I was out of town on business matters from November 12 through November 16. The following week was the week of Thanksgiving. I was out of town (Cincinnati, where my parents and sisters live) for the Thanksgiving Holiday, November 21 to November 25. This week, we have been quite busy completing the post-hearing brief to Judge Kocol in the unfair labor practice matters.
>
> Thus, under the circumstances, your filing unfair labor practice charges are premature. First of all, you do not get to unilaterally establish time frames. Any Employer has a reasonable amount of time within which to respond to information requests. Your supplemental information request of November 16, 2007 is being reviewed, and we will respond within a reasonable period of time.
>
> The reason that I questioned whether the temporary employees were in the bargaining unit is answered by *Oakwood Care Center*, 343 NLRB No. 76 (2004).
>
> The circumstances indicate to the *Santa Barbara News-Press* team that the union is more interested in filing unfair labor practices than anything else.

(G.C. 52). The *News-Press* provided information in response to GCC/IBT's additional information request regarding temporary employees (G.C. 39). The response occurred on January 23, 2008. *Id.*

2. ANALYSIS AND DISCUSSION

The ALJ erred in his analysis. As an initial matter, the requested information pertained to non-bargaining unit employees – temporary employees – and GCC/IBT was not entitled to the information, absent a showing of relevance. The ALJ's gratuitous finding that "the information sought was apparent to the employer under the circumstances" had no basis in law or fact. (ALJD 51:37-41). Rhetoric cannot replace fact. Further, in contrast with the ALJ's gloss, the *News-Press* unequivocally argued that GCC/IBT was not entitled to the requested information. (ALJD 51:34-36).

The *News-Press* responded to GCC/IBT's information request in a reasonable amount of time. There is no contention that the *News-Press* refused to provide the requested information, or that the *News-Press* somehow misrepresented the information. In addition, GCC/IBT's information request sought information about non-bargaining unit individuals and was not, therefore, presumptively relevant. The ALJ further confused the issue, claiming that the information was relevant because it "was pertinent to [GCC/IBT]'s decision to file or process grievances."[2] (ALJD 52: 1).

When evaluating an information request, the Board considers the totality of the circumstances surrounding the allegation; the Board has not defined the duty to furnish information in terms of a per se rule. *See West Penn Power Co.,* 339 NLRB 585, 587 (2003), enfd. in pertinent part 349 F3d 233 (4th Cir. 2005). The Board considers the "complexity and extent of information sought, [and] its availability and the difficulty in retrieving the

[2] There was no grievance procedure in effect. The ALJ's reasoning, therefore, endorses pre-arbitration discovery, a concept abhorred by the Board. *See Cal. Nurses Assn.*, 326 NLRB 1362 (1998); *United Nurses Assn. of Cal. (Sharp Healthcare)*, 21-CB-13798 (2005 Advice Memo). And, again, the issue here was not one of failure to respond, the issue was only whether the *News-Press* timely responded to the information request.

information" in evaluating the timeliness of the response. *E.I. DuPont de Nemours and Co*., 346 NLRB 553, 581 (2006) (citing *Samaritan Med. Ctr*., 319 NLRB 392, 398 (1995)).

GCC/IBT's November 16, 2007 information request was not a simple request. It required consultation with the respective temporary employee agency, as well as an evaluation of the seven qualifications embodied in the information request.

GCC/IBT's request also came during the last quarter of the calendar year, in particular the Thanksgiving holiday, both of which are universally acknowledged as the busiest day of the year in the newspaper industry. (Tr. 2219-2220, 2453).

The *News-Press*, in its November 30, 2007 letter to GCC/IBT, explained that it would take some time to respond to the request as there were professional and personal obligations that had to be addressed, as well. (G.C. 52). The *News-Press* also took issue with GCC/IBT arbitrarily and unilaterally setting a deadline by which to respond – a theme that would, unfortunately continue in the future.

Additionally, the *News-Press* had just completed compiling the information requested in GCC/IBT's extraordinary 59-point information request. (G.C. 16). The time and effort necessary to research, analysis, investigate, and comply with GCC/IBT's initial 59-point request necessarily required the *News-Press* Human Resources personnel to divert time from their otherwise scheduled work. All of the projects and work that had been tabled due to complying with GCC/IBT's 59-point information request did not simply go away; it piled up and had to be addressed.

Furthermore, the information request came at a time when the *News-Press* was drafting its post-hearing brief in NLRB Case No. 31-CA-27950 et al – a brief that totaled 130 pages. That hearing lasted approximately three months, as well.

Finally, added to the mix was the fact that the *News-Press* Human Resources Department was a small department of two to four people. (Tr. 2429, 3249-50). The Human Resources Department had other responsibilities that did not stop because GCC/IBT asked a question, particularly when GCC/IBT made efforts to tax the already limited resources of Human Resources through its onerous 59-point request. The Department was responsible for the other, approximately 130 non-bargaining unit employees of the *News-Press*, too. (Tr. 3249).

All that needs to be remembered, when evaluating whether the *News-Press* timely complied with GCC/IBT's November 16, 2007 information request is the testimony of Ms. Apodaca. Ms. Apodaca candidly testified that her small department made all efforts to comply with GCC/IBT's November 16, 2007 information request. (Tr. 3253-55). Ms. Apodaca did her best to balance professional commitments and personal commitments. (*Id*). GCC/IBT with the assistance of the General Counsel, essentially attacked Ms. Apodaca for being a caring mother. If acting as a responsible parent violates the Nation Labor Relations Act, then the Act ought to be repealed.

B. GCC/IBT MAKES AN INFORMATION REQUEST ON DECEMBER 3, 2007.

1. THE FACTS SURROUNDING THE DECEMBER 3, 2007 INFORMATION REQUEST

Not to be outdone by itself, GCC/IBT propounded yet another information request regarding temporary employees on or about December 3, 2007, that requested already-provided information. (G.C. 29). This request was curious, as the *News-Press* provided, at negotiations on November 14, 2007, a list of employees employed by temporary agencies. (G.C. 39). Nonetheless, on January 30, 2008, the *News-Press*, again, provided the information requested by GCC/IBT. (G.C. 39).

The call of the December 3, 2007, information request was notable because the request recognized two different categories of temporary employees; the request acknowledged temporary employees were either directly hired by the *News-Press* or hired through a temporary agency. The request sought information with respect to both categories, acknowledging that both were temporary employees. GCC/IBT understood – as evidenced through its letter – that an employee hired either directly, or through a temporary agency was a temporary employee.

GCC/IBT's knowledge of temporary employees was firsthand. Employee Mary Lyn Ward, a member of GCC/IBT's bargaining committee, was a directly hired temporary employee prior to being hired full time as a regular employee. (Tr. 3294). Former employee Tom Schultz, who attended negotiations, also was initially hired, directly, by the *News-Press* as a temporary employee. (Tr. 3294-95).

The information request also referred to the certified bargaining unit, which was created by the September 27, 2006 election in NLRB Case No. 31-RC-8602. (RESP. 736). The bargaining unit in NLRB Case No. 31-RC-8602 was defined via stipulation of GCC/IBT and the *News-Press*. (RESP. 737). The draft stipulated election agreement signed by Ira Gottlieb (the same Ira Gottlieb who drafted the December 3, 2007 information request) excluded temporary employees from the bargaining unit. (RESP. 738). The draft stipulated election agreement, the signed stipulated agreement, and the certification of election each specifically excluded "all other employees…" from the defined bargaining unit.

Furthermore, GCC/IBT's initial proposal contained the following proposed article:

Part-Time and Temporary Employees

1. A regular part-time employee covered by this agreement is defined as an employee who is regularly scheduled to work twenty (20) or more hours per week but less than thirty (30) hours per week.

2. Part-time Employees shall be covered by all terms and benefits of the Collective Bargaining Agreement.

3. A temporary employee is one employed for a special project or a specified time, in either case not to exceed three (3) months, unless he or she is replacing a specified employee on a leave of a duration longer than three (3) months (for example, maternity leave or scholastic leave). When the regular employee returns from his/her leave, the temporary employee will be terminated. If the regular employee on leave does not return to work, the temporary employee will be considered for regular employment.

4. In the event that a temporary employee becomes a regular part-time or full-time employee, his/her prior time worked will count for purposes of benefits and seniority.

5. Temporary Workers will not be used to replace or undermine the rights of Bargaining Unit Members.

(G.C. 18 at 11-12). GCC/IBT's initial proposal explicitly recognized and contemplated temporary employees, acknowledging that temporary employees were not members of the bargaining unit.

And, the Recognition clause in GCC/IBT's initial proposal stated, in relevant part:

> *Santa Barbara News-Press* recognizes the Union as the sole and exclusive bargaining agent for all full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Employer's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and copy editors engaged primarily in working on the opinion editorial pages.

(G.C. 18 at 2). This language tracks, verbatim, the certified bargaining unit. (RESP. 736). Again, GCC/IBT deliberately excluded temporary employees from the Recognition clause.

2. ANALYSIS AND DISCUSSION

In spite of the stipulated election agreement that counsel to GCC/IBT drafted and executed (RESP. 737, 738); in spite of the certified bargaining unit description (RESP. 736); in spite of proposed Recognition clause in GCC/IBT's initial proposal (G.C. 18 at 11-12); in spite of the language in GCC/IBT's initial proposal recognizing temporary employees as being excluded from the bargaining unit (G.C. 18 at 2); in spite of the *News-Press*'s handbook describing temporary employees (G.C. 125 at 12); and despite the fact that two members of

GCC/IBT's bargaining committee were former temporary employees at the *News-Press* (Tr. 3294-95), The ALJ concluded that GCC/IBT was unaware of the *News-Press*'s use of temporary employees. (ALJD 41:4-8). Such an assertion was incredible. GCC/IBT either knew of the *News-Press*'s historical use of temporary employees, should have known about the *News-Press*'s use of temporary employees, or failed to exercise any due diligence regarding the *News-Press*'s use of temporary employees, none of which is the responsibility or the result of the *News-Press*.

The ALJ concluded that GCC/IBT was entitled to the requested information in GCC/IBT's December 3, 2007 request. The ALJ's assumption was incorrect; information about non-bargaining unit individuals is not presumptively relevant. *See Disneyland Park*, 350 NLRB 1256 (2007)(company's failure to respond to union's repeated information requests about subcontractors did not violate the Act; union contented a loss of bargaining unit work and company noted that CBA permitted company to set the number of employees, no employee lost work, nor did union claim any employee lost work.)

As explained in *Sara Lee Bakery Group, Inc., v. NLRB* 514 F.3d 422, 430 (5th Cir. 2008), a union has the initial burden of establishing the relevancy of requested information before an employer is to comply. For a company to violate the Act by refusing to provide requested information, two threshold showings must be established:

1. The union must show that, at the time of the information request, it articulated a legitimate purpose for seeking the information; and

2. The union must show that information it requested "bares a logical relationship to a legitimate purpose."

Id at 431. (internal citations omitted) *See also Disneyland Park*, 350 NLRB at 1258.

GCC/IBT's December 3, 2007 information request did not satisfy either of the two requisite threshold showings. The December 3, 2007 written information request did not

articulate any legitimate purpose for seeking the information, nor did the requested information "bear a logical relationship to a legitimate purpose."

GCC/IBT was not entitled to information pertaining to temporary employees. Nevertheless, the *News-Press* provided the information to GCC/IBT. As the *News-Press* was under no obligation to provide the requested information in the first place, there can be no violation of the Act for failing to timely provide the information requested. The allegation should be dismissed.

C. GCC/IBT'S AUGUST 6, 2008 "STANDING INFORMATION REQUEST" NOTIFYING GCC/IBT OF WHEN A NEW EMPLOYEE IS HIRED INTO THE UNIT OR WHEN AN EMPLOYEE TERMINATES.

1. THE FACTS SURROUNDING THE AUGUST 6, 2008 INFORMATION REQUEST

On August 6, 2008, GCC/IBT, through lead negotiator Nicholas Caruso, sent a letter to counsel to the *News-Press* stating, in relevant part:

> I would also like to make a standing information request. Please inform me (within a day or two) when there is a new employee hired into the unit, and an employee terminates (including resignation), or an employee working in the newsroom has a change in employment status (including changes in employee title, duties or other terms and conditions of employment.
>
> I cannot rely on rumor with regard to employees being hired or leaving. I have heard a news reporter has been hired and there will be new employees hired into the Sports Department. I have sent mailings to newsroom employees only to find they are no longer working at the *News-Press*. (I would like the notification to include date of hire, classification and rate of pay.)

(G.C. 75 at 2).

At negotiations on September 3, 2008, the *News-Press* provided a roster that provided GCC/IBT a bargaining unit roster of employees and included the employee's name, hire date, status, regular hours worked in 2007, overtime hours worked, and gross wages. (G.C. 411; RESP. 552 at 2; Tr. 2465-66). The roster sheet was presented to GCC/IBT by Commissioner Jim Rucks. (RESP. 552 at 2; Tr. at 2465-66).

2. ANALYSIS AND DISCUSSION

The *News-Press* responded to GCC/IBT's August 6, 2008 written information request on September 3, 2008; however, the information request cannot be viewed in a vacuum. Consider:

1. On October 22, 2007, GCC/IBT made a 59-point information request seeking employee names and data. (G.C. 15). On November 9, 2007, the *News-Press* provided information pertaining to bargaining unit employees. (G.C. 19).

2. On November 14, 2007, Caruso verbally requested the exact ending date for the year-to-date 2007 wage information provided. (RESP. 347 at 6).

3. On February 15, 2008, the *News-Press* provided responsive documents. (RESP. 891).

4. On December 4, 2007, GCC/IBT made a request regarding bonuses and wage increases. (G.C. 30).

5. On December 10, 2008, the *News-Press* acknowledged Caruso's letter. (G.C. 31); on January 22, 2008, the *News-Press* provided 2007 bonus information. (G.C. 37); and on January 23, 2008, the *News-Press* provided wage increase information (G.C. 38).

6. On February 21, 2008, GCC/IBT made a request (dated February 18, 2008) relating to hours and earnings of bargaining unit employees. (G.C. 42; RESP. 427).

7. On February 25, 2008, the *News-Press* acknowledged GCC/IBT's request and communicated that it was working on it. (G.C. 43).

8. On February 26, 2008, the *News-Press* provided the requested information. (RESP. 251).

9. On February 27, 2008 – the next day – Caruso verbally requested that the *News-Press* supplement RESP. 251 with the hours worked.

10. On April 2, 2008, the *News-Press* provided a response. (RESP. 258).

11. On May 23, 2008, GCC/IBT made another information request for hours and earnings. (G.C. 58).

12. On June 11, 2008, the *News-Press* responded, in writing (G.C. 66), noting that it had already provided, on April 2, 2008, the information GCC/IBT again requested. (G.C. 66).

13. On July 10, 2008, GCC/IBT made another verbal request for the employee roster. On July 11, 2008, the *News-Press* provided the requested information. (RESP. 544).

14. On July 11, 2008, GCC/IBT made another verbal request regarding RESP. 258, this time demanding that the hours worked be broken into straight time hours and overtime hours. On September 3, 2008, the *News-Press* provided the requested information. (G.C. 411).

This chronology is important as GCC/IBT's August 6, 2008 information request was not an isolated request. It was just another part of GCC/IBT's "bludgeon strategy" of information requests requesting the same information and/or information GCC/IBT already possessed. The Complaint "cherry-picked" information requests. Remember, GCC/IBT made at least 26 information requests of the *News-Press* in a 17-month span.

There is no precedent for a "standing information request." The notion of a continuing information request or "standing information request" is an anathema to the Act. Section 8(d) of the Act requires that parties negotiate in good faith to reach an agreement that covers hours, wages, and terms and conditions of employment of represented employees. Providing GCC/IBT with information on a regular basis or when employees enter or leave the company is a contract term that can be negotiated, but is not a statutory obligation with which the *News-Press* must comply at the beck and call of GCC/IBT.

GCC/IBT recognized that the notion of a "standing" information request was a bargainable issue rather than a statutory obligation. GCC/IBT, in its initial proposal proposed, in relevant part:

Information

1. *Santa Barbara News-Press* will provide the Union on an annual basis the name, address, salary, and job classification of each employee in the unit. *Santa Barbara News-Press* will also provide such information on a monthly basis when an employee is hired, terminated, reclassified or receives a change in salary status.

2. The Employer will also provide any requested information to Union Officials necessary to perform their duties as representatives of the Bargaining Unit.

(G.C. 18 at 19-20).

This charge is an attempt to obtain an unachieved bargaining demand. To date, the *News-Press* has not accepted GCC/IBT's proposal on "Information." How ingenious for GCC/IBT to make an information request incorporating the same language it proposed – and which the *News-Press* rejected – only to file a charge when the *News-Press* declined to be bound to the arbitrary notion of a "standing" information request! The ALJ's error can be paraphrased by stating "don't let the Act get in my way, I have an agenda to accomplish."

A "standing" information request is improper for a variety of reasons. Initially, it is an "end run" around Section 10(b) of the Act. Section 10(b) exists so that labor disputes are resolved promptly, as industrial strife negatively impacts the free flow of interstate commerce. A "standing" request erases the six-month limitation embodied in Section 10(b) of the Act. With a "standing" information request, a requesting party could allege, hypothetically, that the requested party, on October 1 of a calendar year did not comply with a standing information request that it made on January 1 of that same year. In such a scenario, the 10(b) statute limitations would have expired, however, the "failure" to comport with the "standing" information request made January 1 would circumvent the 10(b) period. In effect, a "standing" information request would erase Section 10(b) of the Act.

Furthermore, a "standing" information request does not foster good faith bargaining. Rather, it is an attempt to induce an unfair labor practice. Rather than making information requests concurrent with need or desire, a party could simply file a charge claiming that the other party did not comply with a "standing" information request and had bargained in bad faith. A "standing" information request transfers the burden of gratuitously complying with the request on the party with the information.

The obligation to provide information pursuant to a valid information request is a mechanism to foster collective bargaining between the parties. In order for the response mechanism of an information request to be triggered, a valid request should be made. A "standing" request unnecessarily complicates the bargaining process as the requested party is always potentially in violation of the "standing" request.

The sword of Damocles created with a "standing" information request would do far more harm than good, as it would engage the Agency in the substance of collective bargaining, rather than refereeing the processes. A "standing" information request unnecessarily creates a "bargaining bureaucracy" that does little to foster the process. If a party desires information, it should make a request and a receiving party should respond.[3]

D. THE SEPTEMBER 9, 2008 WRITTEN INFORMATION REQUEST RE: NOTIFICATION OF STATUS CHANGES FOR VARIOUS "WORKERS PERFORMING BARGAINING UNIT WORK."

1. THE FACTS SURROUNDING THE SEPTEMBER 9, 2008 INFORMATION REQUEST

On September 9, 2008, by letter, Caruso wrote to *News-Press* Counsel L. Michael Zinser, stating, in relevant part:

> I am writing to follow up on my letter of August 6, 2008 and the employer's September 4, 2008 request that the Union withdraw our *Employee Integrity* Proposal. I am also confirming my availability to meet on October 22nd and 23rd.
>
> In my letter, I requested to be updated on changes in employment status. Not only did you fail to supply the requested information, you didn't even bother to reply. We have repeatedly expressed concerns with the lack of communication and cooperation regarding employment status changes in the Newsroom, which are apparently ongoing.
>
> I have heard from others outside the *News-Press* Management that the vacancies created by Blake Dorfman, John Dvorik [sic] and the discharge of Dennis Moran (all bargaining unit positions) will all be filled by either Temporary works or

[3] It goes without saying that the duty to comply with information requests is a two-way street. An employer can abuse this obligation just as easily as a labor organization; a labor organization can be equally culpable in failing to comply with an information request.

> Freelance writers. I would add the termination of Dennis Moran was clearly an attempt to weaken the Union, was in retaliation for his Union and other activity protected by the National Labor Relations Act and was not supported by any creditable evidence or investigation. I again request that the Employer provide notification of status changes for workers performing bargaining unit work. I understand stories have recently appeared under bylines of Alex Pavlovic, Dave Mason, Chauncey Kim, Alan Hunt, Bill McMorris, and John Greely. Please state the status of each of these people, their classification, their wages and benefits, and whether the *News-Press* considers them to be in the bargaining unit or not, and if not, what is their status in the *News-Press*'s view. Please provide the same information for any other people performing bargaining unit work with respect to whom you have not yet provided this information. We note that you have placed job notices for "Freelance writers to write Sport articles" while the Sports Department has been depleted of bargaining unit people. Please provide all the requested information no later than September 19, 2008.
>
> ****
>
> I do appreciate you finally providing me with wage and hour information that I have been requesting for almost a year. I now know the hours worked and earnings for the Newsroom employees working in calendar year 2007. Had I received the information in a timely matter, it may have been much more beneficial to discussing the existing situation in the Newsroom and resolving some issues. We will review the data, combined with new hire information to reassess the unit profile.

(G.C. 84) (italics in original). This letter sought more information than did the August 6, 2008 letter of Caruso. (G.C. 75). The September 9, 2008 letter also inexplicably contradicted itself. The second paragraph claimed that the Company did not bother to reply to the August 6, 2008 letter, yet the fifth paragraph acknowledged and thanked the Company for providing wage and hour information – ***which was provided at negotiations*** on September 3, 2008 ***in response to the August 6, 2008 letter.***

On October 22, 2008, at negotiations, in response to various questions posed by GCC/IBT, the *News-Press* responded, in writing, stating, in relevant part:

> 2. **Bargaining unit employee list of July 10, 2008** – You had asked to be informed of any changes to this list. Dennis Moran, John Dvorik [sic], and Blake Dorfman are no longer with *Santa Barbara News-Press*. There would necessarily be no changes to the 2007 earnings document we presented to the Union on September 3, 2008. That list's earnings for employees who worked in

> the unit during calendar year 2007 with their hours and earnings. That is just a record that will not change.

(G.C. 420; RESP. 572 at 2).

The next day, October 23, 2008, GCC/IBT responded to the *News-Press*'s response, stating, in relevant part:

> 2. **Bargaining Unit Employee List of July 10, 2008** – Information provided.

(G.C Ex. 421; Resp. Ex 573 at 1).

On October 24, 2008, the *News-Press* further responded to GCC/IBT's September 9, 2008 information request. The response noted that the request pertained to non-bargaining unit individuals. In relevant part, the October 24, 2008 letter stated:

> This letter is in response to your September 9, 2008 information request. *Santa Barbara News-Press* was disappointed to learn that GCC/IBT filed charges in Cases No. 31-CA-28944 after you informed Commissioner Rucks that the information we provided you on September 3, 2008, completely satisfied your August 6, 2008 request.
>
> Your September 9, 2008 letter requesting information regarding certain individuals performing work at *Santa Barbara News-Press* is a new and separate information request. Further, your request does not pertain to bargaining unit employees. Your September 9 request seeks information regarding temporary employees without leaving any argument that you actually entitled to the request information, and as a showing of good faith, *Santa Barbara News-Press* provides the following: [information]
>
> ****
>
> Finally, your letter claims to be a "standing request" for information. We will continue to respond to legitimate information requests as they are made. However, as explained to you previously, we do not believe a standing information request is valid. It demonstrates bad faith, is conditional bargaining, and creates a "bargaining bureaucracy." That you made such a dubious request reflects, we believe, the bad faith approach you have taken towards negotiations. A "standing request" is little more than a lame attempt to induce *Santa Barbara News-Press* to commit an unfair labor practice – an action that actually is a violation of the National Labor Relations Act. Unless you have authority to the contrary to support the concept of a standing information request, we demand you to rescind this bad faith bargaining tactic.

> A requirement such as your request must be bargained by the union. You certainly have the right to make such a proposal for the collective bargaining agreement.

(G.C. 89 at 2-4).

2. ANALYSIS AND DISCUSSION

GCC/IBT's information request was over non-bargaining unit individuals. Nowhere in Caruso's September 9, 2008 letter was an explanation of why or how the requested information was relevant. GCC/IBT had the burden of establishing the relevancy of the requested information before the *News-Press* ever had an obligation to comply. *See Disneyland Park,* 350 NLRB at 1265 (citations omitted). As GCC/IBT was not even entitled to the requested information, it cannot be a violation of the Act for the *News-Press* to not have timely provided it.

However, assuming *arguendo,* that the information sought was relevant, and GCC/IBT was entitled to the information, the *News-Press* responded in a timely manner. There were at least 26 other information requests made in a 17-month span. This September 9, 2008 was merely one of them. Furthermore, in the *News-Press*'s October 24, 2008 response, the *News-Press* invited GCC/IBT to provide some authority for the notion of a "standing" information request (G.C. 89 at 3). Neither the ALJ nor GCC/IBT ever did.

E. THE INFORMATION REQUESTS PERTAINING TO RICHARD MINEARDS

1. THE FACTS SURROUNDING MINEARDS' INFORMATION REQUESTS

At collective bargaining negotiations on January 14 and 15, 2009, GCC/IBT, through Caruso, verbally inquired about employee Richard Mineards' layoff. (Tr. 2438-39). Mr. Caruso asked Mr. Zinser to "look into it." (*Id*). Mr. Zinser was unaware of Mr. Mineards layoff and stated that he would "look into it." (*Id*). On or about January 26, 2009, GCC/IBT through Caruso, formalized its general inquiry by letter. (G.C. 112). A mere 14 days later, on February 9,

2009, Mr. Zinser responded. (G.C. 113). Significantly, the *News-Press* invited GCC/IBT to meet and discuss Mr. Mineards' layoff to the extent that GCC/IBT so desired.

2. ANALYSIS AND DISCUSSION

A scant 14 days passed between GCC/IBT's formal written information request and the *News-Press*'s response. The *News-Press* complied with GCC/IBT's information request – again, there is no allegation that the *News-Press* somehow refused to provide the requested information. Again, the totality of the circumstances surrounding this allegation should be examined. *See West Penn Power Co*., 339 NLRB at 587. The *News-Press* conducted an investigation after Mr. Caruso's inquiry and responded, accordingly.

Of the 26 information requests made by GCC/IBT of the *News-Press* in a 17-month span between October of 2007 and March of 2009, the *News-Press* responded to ten of them in an amount of time greater than 14 days (between 15 days and 60 days), and none of those responses garnered a charge.[4] The "discretion" exercised by the General Counsel in prosecuting "unreasonable delay" allegations was arbitrary. The *News-Press* responded to GCC/IBT's information request regarding Mr. Mineards in a timely manner. This allegation should be dismissed.

IV. ALLEGATIONS PERTAINING TO RICHARD MINEARDS' LAYOFF

The ALJ erred by concluding that the *News-Press* violated Sections 8(a)(1) and (5) of the Act by failing to bargain with GCC/IBT over Richard Mineards' layoff and directly dealing with Mineards. The *News-Press* laid off Mineards because the *News-Press* discontinued Mineards' gossip column – an act that changed the scope and direction of the newspaper. There is no obligation to bargain over a change in the content of the newspaper. The *News-Press* did not directly deal with Mineards. The *News-Press* had limited, unsuccessful, discussions with

[4] An additional four charges exceeded 14 days and were the subject of unfair labor practice charges.

Mineards about Mineards possibly contributing to the *News-Press* as a freelancer. The potential column would have been different from his former column and the *News-Press* also proposed that Mineards write a "personality profile" as part of his duties. Finally, the *News-Press* and GCC/IBT have negotiated about the effects of Mineards' layoff; there has been no agreement.

A. FACTUAL BACKGROUND

On or about January 7, 2009, the *News-Press* laid off Mr. Mineards . (Tr. 886-87). Mr. Mineards "understood in the current climate" in the newspaper industry that the *News-Press* had made a business decision to lay him off. (Tr. 888). Mr. Mineards further stated that with the straits of the newspaper industry "I fully understood the circumstances." (Tr. 888-889).

Approximately one week later, Director of News Operations Don Katich contacted Mr. Mineards about contracting with the *News-Press* as a freelancer to write a different column that was focused more on people rather than events and to also write an additional two profiles as part of the arrangement. (Tr. 892-93). Mr. Mineards respectfully declined the offer and instead accepted a position with the competing *Montecito Journal* to write a column. (Tr. 893, 923).

On or about January 14, 2009, at negotiations, GCC/IBT raised the issue of Mr. Mineards' layoff to the *News-Press*. On January 26, 2009, GCC/IBT wrote a letter requesting information on Mineards. (G.C. 112). On February 9, 2009, the *News-Press* responded, stating, in relevant part:

> The *News-Press* made a business decision to layoff Mr. Mineards. The layoff was effective January 7, 2009. Mr. Mineards was paid approximately $75,000 a year to write one column per week. He wrote a "gossip" column. I note that early in the negotiations, the union expressed doubt about the propriety of his inclusion in the unit. The *News-Press* felt this to be an inefficient use of its resources, especially in these turbulent economic times. To the extent that you desire to meet and discuss this issue, we are available to meet. Please be advised that we feel this issue should be discussed independent of negotiations towards a Collective Bargaining Agreement.

(G.C. 113 at 2).

Later that day, on February 9, 2009, GCC/IBT responded to the *News-Press*'s February 9, 2009 letter, requesting bargaining on both the decision and effects of the layoff. (G.C. 114).

On February 26, 2009, parties met specifically for the purpose of negotiating Mr. Mineards' layoff. The meeting was separate and apart from negotiations for a CBA. (Tr. 1994). At the meeting, the *News-Press* made a written proposal. (G.C. 443).

Mr. Caruso confirmed that the parties negotiated. (Tr. 1994-95). The *News-Press* chronicled its negotiations regarding Mr. Mineards' layoff. (RESP. 713). The *News-Press* asked GCC/IBT if Mr. Mineards would be willing to become a 40-hour a week employee and perform other assignments; GCC/IBT said no. (*Id*). The *News-Press* confirmed that Mr. Mineards only wanted to write his column and would be willing to do profiles, but that was it. (*Id*). GCC/IBT indicated that Mr. Mineards was not interested in writing stories other than columns. (*Id*). The meeting did not yield a final agreement.

B. DISCUSSION AND ANALYSIS

The *News-Press* negotiated with GCC/IBT regarding Mr. Mineards' layoff. GCC/IBT acknowledged this fact. (Tr. 1994-95). As for the allegation that the *News-Press* directly dealt with Mr. Mineards, the *News-Press* does not deny that Mr. Katich had limited and unsuccessful contact with Mr. Mineards about becoming a freelancer to write a different column. However, to the extent that the *News-Press* violated the Act, the violation was *de minimus*.

1. THE *NEWS-PRESS* NEGOTIATED WITH GCC/IBT OVER MR. MINEARDS' LAYOFF

The *News-Press* has no obligation to bargain over a decision that "amounts to an entrepreneurial decision 'involving a change in the scope and direction of the enterprise' and therefore falls outside the ambit of mandatory subjects of bargaining." *Tel Plus Long Island*, 313 NLRB No. 47, Slip Op. at 9 (1993) (not reported in bound volumes), citing *First National*

Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Eliminating Mineards' gossip column was just such an example.

In contrast with the ALJ's finding, the decision to layoff Mineards was a management decision that involved the change in the scope and direction of the newspaper and was akin to the decision about whether to be in business at all. *See* 452 U.S. at 676-77. Decisions "such as choice of advertising and promotions, ***product type and design***, and financing arrangements, have only an indirect attenuated impact on the employment relationship, and are not subject to bargaining." *Id* (emphasis added).

The decision to discontinue the column was a decision about the design of the newspaper, and went to the type of product the *News-Press* produced. The *News-Press*, in its business judgment, elected to discontinue carrying a gossip column. The *News-Press* hired no one to replace Mineards; the column has not been added to any other employee's responsibilities. Further, no member of management has taken to writing a gossip column. The decision to discontinue the gossip column was a core entrepreneurial decision. The *News-Press* had no obligation to bargain with GCC/IBT over this decision.

In addition, per *First National Maintenance*, the *News-Press* had no obligation to bargain over the decision to layoff Mineards. The third category of business decisions described in *First National Maintenance Corp.* is management decisions that have a direct impact on employment – such as eliminating jobs – but which have as their focus only the economic profitability of the business. In these situations, a company is obligated to bargain "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id*. In *First National Maintenance*, the Court made a clear distinction between decisions pertaining to the effects of a layoff and decisions concerning whether to have

a layoff. The decision of whether to have a layoff involves the entrepreneurial judgment as to how many employees an employer will employ.

Again, an entrepreneurial decision to change the content of the newspaper motivated the decision to layoff Mineards. The *News-Press* has an unequivocal management right to control the content of the newspaper. *See Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1990)(production of a newspaper lies at the core of publishing control.) In *First National Maintenance*, the Court declared "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. 452 U.S. at 676. The Court explained, "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business and must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." *Id.* at 679. Deciding what to publish is not a subject over which the *News-Press* has an obligation to bargain.

The *News-Press* and GCC/IBT negotiated over the effects of Mr. Mineards' layoff. On February 9, 2009, the *News-Press* specifically invited GCC/IBT to bargain over the effects of the decision to layoff Mineards. (GC 114). On February 26, 2009, the parties met to negotiate over the effects of the decision. (Tr. 1990; 2438-39, 1993-96). No agreement was achieved; the *News-Press* even explained its position in writing. (Tr. 2438-39; RESP 443, 713).

As explained to GCC/IBT, the *News-Press* could not justify, in its business discretion, continuing Mineards' column at its high price. (GC 443). Mineards, too, was unwilling to take on greater job responsibilities. (Tr. 2439). The *News-Press* considered maintaining the content, so long as Mineards accepted other assignments. In negotiations with GCC/IBT on February 26,

2009, GCC/IBT indicated that Mineards was unwilling to expand his duties to what the *News-Press* desired. (TR. 2439).

2. THE DIRECT DEALING ALLEGATION WAS A *DE MINIMUS* VIOLATION OF THE ACT

The evidence revealed that prior to the *News-Press* bargaining with GCC/IBT over Mr. Mineards' layoff, the *News-Press*, through a news manager unschooled in the world of labor relations, had an isolated, unsuccessful discussion with Mineards about becoming a freelancer. (Tr. 3194). The thought was for Mineards to write a different type of column for the *News-Press*, in addition to two "profile" stories per week. (Tr. 892-93, 3194). The ALJ erred in failing to recognize the isolated nature of the discussion. (ALJD 58:8-10).

At most, the *News-Press* committed a *de minimus* violation of the Act. The prosecutions of *de minimus* violations of the Act are detrimental to the administrative process. Litigating *de minimus* violations does not effectuate the policies of the Act. Overzealous and blind prosecutions of de minimus violations of the Act are a waste of time and resources. *See Dallas Mailers Union Local No. 143 vs. NLRB*, 445 F.2d 730, 732-33 (D.C. Cir. 1971); *United States Postal Service*, 242 NLRB 228, 228 (1979)(Penello in concurrence). This *de minimus* allegation should be dismissed.

V. ALLEGATIONS PERTAINING TO ROBERT ERINGER

A. THE *NEWS-PRESS* LAWFULLY ENGAGED FREELANCE WRITER ROBERT ERINGER TO WRITE STORIES FOR THE *NEWS-PRESS*

The ALJ's errors[5] with respect to freelancer Robert Eringer commenced at the onset of his decision where he categorized the issue as "allegations respecting ***employee*** Robert Eringer."

[5] Independently this error appears benign. However, given the cacophony of benign errors contained in the ALJ's Decision, added together, these errors reflect an overall lack of attention to detail to the complex issues in this case.

(ALJD 61:9). The General Counsel did not even allege that Eringer was an employee as the complaint alleged:

> …since on or around May 16, 2008, the *News-Press* transferred unit work to non-unit individual, Robert Eringer.

(G.C. 1(ffff) at Para. 11).

The ALJ recognized that the *News-Press* "has historically utilized freelance writers and photographers who provide publishable material for the Paper essentially since it acquired the *News-Press*. And there was also no dispute that it has done so regularly and to no small extent …" (ALJD 62: 7-9). The ALJ then tried to rephrase the issue by claiming:

> the dispute here is whether there existed a sufficiently discrete category of bargaining unit work at the Paper for which there was no history of use of freelance writers, i.e., investigative journalist or investigative reporter and whether Eringer's use by the Respondent was a break in or exception to the contended history of nonuse of freelance contractors for such work. It is necessary then to consider in a sense the taxonomy of the phylum "reporters" or "journalists" as well as the specific terms and content of the work of the individuals involved.

(ALJD 62:11-17). This issue was not pled in the Amended Consolidated Complaint.

In spite of this erudite explanation, the ALJ manipulated the record to whitewash all evidence that firmly established the *News-Press*'s history of using freelance writers; "investigative journalism" was never exclusively performed by bargaining unit employees; and there was a demonstrated history of freelancers who did investigative journalism – as admitted by the witnesses called by the General Counsel to prove his case! The ALJ's findings were an insult to the record evidence and little more than a sham finding to bolster a weak General Counsel argument.

The General Counsel called three witnesses – Scott Hadley, Dawn Hobbs, and Scott Steepleton – in an effort to prove that the *News-Press* transferred "unit work" to freelancer Robert Eringer since May 16, 2008. The ALJ glossed over Hadley's testimony and failed to

acknowledge Hobbs' testimony. The evidence adduced at the hearing demonstrated that the *News-Press* had a past practice of utilizing freelance writers to provide content for the newspaper.

Mr. Eringer's articles were generally a column-style article that appeared on page 2 of the newspaper, a style that was uncommon for employees; neither Mr. Hadley nor Ms. Hobbs examined a single freelance article before asserting that freelancers never performed investigative reporting or crime reporting; and when confronted with articles written by freelancers that were investigative and crime pieces written by freelancers, both Mr. Hadley and Ms. Hobbs acknowledged that freelancers did in fact write investigatory pieces and articles involving crime. Furthermore, Mr. Hadley testified that the articles written by Mr. Eringer were not investigatory reporting.

1. FACTS ESTABLISHED THROUGH MR. SCOTT HADLEY

Mr. Hadley testified that his byline was "Senior Writer." (Tr. 709). Mr. Hadley explained that while the work he performed could be categorized as investigative, Mr. Hadley stated:

> You know, it's actually kind of a hard thing to define because the skills in some of the things that you use in investigative reporting are things that you would use in just everyday reporting. But in general, investigative reporting implies a sort of deeper level of inquiry, a more thorough use of sourcing. And there's an implication that in investigative reporting there's something that is impeding access to information, either because you're dealing with a malfeasance or criminality, and so it's more difficult to get to that information. That's not a great definition, but you know it when you see it is maybe a better way of describing it.

(Tr. 710). The term "investigative reporter," itself, was not dispositive of any issue.

To the extent that the ALJ concluded that bargaining unit work included "investigative reporting" Mr. Hadley torpedoed the ALJ's finding in his June 26, 2008 NLRB affidavit. (Tr. 736). Mr. Hadley testified:

> For the last few weeks, I have read some of Robert Eringer's articles in the *Santa Barbara News-Press* and ***I have not seen any articles that I would classify as investigative reporting***. I based my conclusion on the fact that Eringer has relied on sources like police reports and single phone calls, which tend to be fodder for general reporting, rather than investigative reporting. I have not seen anything that Eringer uncovered something that was not contained in a police press release or the result of a phone call.

(Tr. 749) (emphasis added). Mr. Hadley confirmed that he made that statement. (*Id*). Mr. Hadley continued:

> Q: Unlike yourself, when you worked at the *Santa Barbara News-Press*, you don't believe Robert Eringer is an investigative reporter, do you?
>
> A: I don't know. I was asked to look at his articles over that period of time, and I didn't see something that was an example of that.
>
> Q: So based on what you read, he's not an investigative reporter, is he?
>
> A: ***The stories that I read over the period of time were not examples of investigative reporting***. I don't know his body of work.

(Tr. 750) (emphasis added). Mr. Hadley further testified that he did not review articles written by freelancers that appeared in the *News-Press* for the three-year period prior to his resignation in mid-July, 2006, did not do any sort of "retrospective review of all the articles of freelancers" and has not read the *News-Press* "very carefully since [he] left" in mid-July, 2006. (Tr. 745). Hadley's testimony undermined the allegations. How the ALJ determined that Eringer performed bargaining unit work boggles the conscience.

Mr. Hadley further acknowledged that even after being announced as an "investigative reporter" in a press release, he was never an exclusive "investigative reporter" for the *News-Press*. (Tr. 714-15). He explained that his byline never changed to say investigative reporter, rather his byline bore the description "Senior Writer." (Tr. 715). As far as the "vast majority of the stories" that Mr. Hadley wrote while he was at the *News-Press*, the stories "were just sort of straight news stories. In terms, the – and I couldn't give you the percentages, but it's got to be like 80 and maybe even more percent of the stories that I did" were straight news stories. (Tr.

717-18). Mr. Hadley explained that he would work on a story over a period of time "while I was also producing daily news stories." (Tr. 718).

2. THE TESTIMONY OF DAWN HOBBS

Ms. Hobbs was among the most active and ardent union supporters at the *News-Press*. (Tr. 1303-04). Among Ms. Hobbs' more colorful quotes were that publisher "McCaw began attacking her staff and mixing opinion and news;" … "in dictatorial fashion, McCaw has fired reporters, filed lawsuits against the critics, and harassed former employees with cease and desist letters seeking to silence those who speak out for the freedom of the press;" … and "we need a newspaper that is responsive to the community and keeps publishers' views out of the news. A paper that is good for democracy and good for business." (Tr. 1292-93; RESP. 823). Ms. Hobbs was biased against the *News-Press*. Her testimony must be evaluated with this fact in mind.

Although Ms. Hobbs testified to demonstrate that the *News-Press* assigned "investigative journalism" to Eringer, on cross-examination she was loathe to consider any work she performed at the *News-Press* as investigative reporting. Undoubtedly this arose from her wage and hour lawsuit against the *News-Press* where her claim depended on her not having any individual control over her work. (Tr. 1214, 1215, 1217). Ms. Hobbs explained that every story written by a reporter of the *News-Press* required authorization from management. (Tr. 1220-22). All reporters (including Hadley) received direction from management on story assignments, as well. (Tr. 1222-25). Ms. Hobbs testified that she had never been an investigative reporter and that she used no imagination in the course of her work. (Tr. 1218). Ms. Hobbs even purported to not know what the word "talent" meant and testified that she was not very talented. (Tr. 1214-18). Ms. Hobbs's testimony regarding investigative reporting, techniques, background, and the like, should be disregarded. Ms. Hobbs stated:

> I did not claim I had an investigative reporting specialty. I do not consider myself an expert on the matter.

(Tr. 1238). Ms. Hobbs' statements on cross-examination must be read in the context of her defining, at the General Counsel's behest, the term "investigative reporting." (Tr. 1161-62). The General Counsel even asked Ms. Hobbs "when did you start doing investigative reporting work for *Santa Barbara News-Press*?" To which Ms. Hobbs responded "from the first day I was there." (Tr. 1163). Furthermore, the General Counsel attempted to prove that awards received by Ms. Hobbs for investigative reporting somehow, as a matter of fact, made her an "investigative reporter." (Tr. 1164-65). However, Ms. Hobbs made it very clear that although she won the 2001 Southern California journalism award for investigative reporting (Tr. 1165-1235), she was unequivocally not an investigative reporter. (Tr. 1224-1238).

Ms. Hobbs' scripted testimony with respect to investigative reporting was unbelievable. Ms. Hobbs testified, unequivocally, that freelance writers did not ever write investigative stories for the *News-Press*. However, Ms. Hobbs admitted that she did not review a single article before making her assessment. (Tr. 1249). Furthermore, when confronted with articles written by freelancers, Ms. Hobbs admitted that the articles involved the same "investigative journalism," that she claimed was the exclusive work performed by members of the newsroom. (Tr. 1240-49). This revelation was stunning, considering the accusations made by the General Counsel and reinforced by Ms. Hobbs' direct testimony.

Ms. Hobbs acknowledged that GCC/IBT's charge in the General Counsel's case was nothing more then a bald assertion:

> Q: Before you testified for the government about there being no freelancers that wrote any investigative pieces for the *News-Press* while you were there those many years, did you go back and check to see what other freelancers may have written? Yes or no?
>
> A: Did I go back to see what they may have written? No, it was my recollection that all of the interns as well as the freelancers, I believe, were identified on their byline as Correspondent, and I do not recall reading any investigative pieces by any correspondents.

> Q: But you knew that your union was making a charge and you knew that the government decided that they were going to file that charge, and did anybody tell you that it would be a good idea if somebody went and checked the *News-Press* to see if you were right before they relied on that evidence to accuse this as they did?
>
> A: Did anybody tell me to – is the question did anybody tell me to go back and review material? No.

(Tr. 1249). Rhetoric is not fact. There were no facts adducted at the hearing to support this charge. This allegation should be dismissed.

3. FACTS ESTABLISHED THROUGH CITY EDITOR SCOTT STEEPLETON

Mr. Steepleton explained that the *News-Press* used freelancers, regularly, since he began his employment in 2000. (Tr. 564-65). Mr. Steepleton explained that the *News-Press* never had an employee who worked exclusively as an investigative reporter. (Tr. 549). When asked to define investigative reporting, Mr. Steepleton explained:

> Well, it's kind of a Woodward and Bernstein-esque, you know, phrase or depiction. But a Features Reporter could do an investigative story.

(Tr. 550). Additionally, a Sports Reporter or Life section Reporter could write an investigative story as well. (*Id*). Mr. Steepleton explained that there was nothing sacred about the term "investigative reporter" at the *News-Press*. (Tr. 551).

The *News-Press* contracted with freelancers, in 2006, to provide sports coverage. (Tr. 2960). The stories covered by freelance writers were stories of a type that had also been covered by *News-Press* employees. (Tr. 2961). RESP. 922 was a collection of stories written by freelancers that were "crime in courts stories." (Tr. 2963). They were examples of stories that former employee Dawn Hobbs might have written during her time at the *News-Press*. (*Id*). Mr. Steepleton considered these stories to be "investigative" stories because:

> Some are the kinds of stories that look at numbers that have been crunched in elections. Some of them are kind of feature-y, kind of tracing history kinds of

> things. Some of them take a smaller issue and kind of enlarge that issue. Some take an incident and expand on a particular incident. Some require looking at a database searching to piece together a story with what the search of the database provides you.

(Tr. 2956).

Mr. Steepleton also explained that reporters at the *News-Press* typically developed a "niche," but were far from proscribed from writing alternate types of stories. Mr. Steepleton explained that Mr. Hadley wrote stories about surfing for the Life section, as well as writing a story about a local author, as well as some features. (Tr. 2967; RESP. 982 at 2). Employee Dave Mason, a Life section writer, has written stories that have appeared in the News section. (Tr. 2967). Life section writer Karna Hughes has written stories that have appeared in the News section. (*Id*). Life section writer Marilyn McMahon has written stories that have appeared in the News section. (*Id*).

With respect to Mr. Eringer, the *News-Press* had a unique opportunity to contract with an individual who had one-of-a-kind contacts, credentials and experiences to provide content for the newspaper:

> He's got a background as a CIA Operative, he's a published author, he's done work for the FBI. He's done work – the principality or the government of Monaco, he's got a celebrated, world traveled, fanciful kind of career that I saw a lot of value in.

(Tr. 557). Mr. Eringer had qualifications that no Newsroom employee possessed. (Tr. 557-58).

Mr. Eringer's articles typically "were a column-style article which often had opinion in it, could have a back and forth with the reader that a news story wouldn't," or could have a first person story style to it. (Tr. 560). Mr. Eringer's stories ran on page 2 of the *News-Press* and contained a mug shot. (*Id*). Furthermore, Mr. Eringer had a moniker, "The Investigator," associated with his writing. (Tr. 555). This nickname was the brainchild of Mr. Eringer and Mr. Steepleton to give Mr. Eringer's column "a little edge to it." (Tr. 555). No employees had

nicknames associated with their writing. (*Id*). Similarly, no employees wrote a column-style article. (Tr. 560). Furthermore, *News-Press* employees did not write column-style articles that appeared on page 2 of the newspaper. (Tr. 560-61).

B. THE *NEWS-PRESS*'S CONTRACTING WITH MR. ERINGER DID NOT VIOLATE THE ACT

In contrast with the ALJ's gloss, there existed a very real dispute about whether Mr. Eringer performed any work that could be considered "bargaining unit work." (ALJD 63:18-19). The General Counsel, GCC/IBT, and the *News-Press* all proffered evidence about the work performed by Mr. Eringer. The General Counsel went so far as to claim that the title "investigative reporter" was dispositive of the issue, without actually examining the work performed by the individual. (Tr. 710). The ALJ's dismissive statement that it was "unnecessary to resolve the arguments of the parties regarding investigative reporters to find that Eringer, either as a columnist or investigative reporter did unit work" ignored the entire issue. (ALJD 63:19-21). The ALJ ignored the fact that Eringer was a freelancer, first and foremost. What work he performed was secondary. And, the ALJ ignored the evidence demonstrating that the type of work claimed by the General Counsel and union as "bargaining unit work" had historically been performed by freelancers not, as the ALJ opined "a new arrangement for which there was no previous history." (ALJD 64:24-25).

The ALJ correctly acknowledged that past practice served as an affirmative defense to the *News-Press*'s contracting with Eringer. (ALJD 63:28-29). Recognizing this, the ALJ should have concluded that the *News-Press*'s arrangement with Eringer was consistent with the status quo for freelancers.

The ALJ's attention to subcontracting cases modified the issue to support a particular legal theory. (ALJD 68:28-34). The instant facts did not correspond with case law regarding subcontracting. The ALJ forced a square peg through a round hole in order to find a violation of

the Act. The issue was one of freelancers, not bargaining unit work. The General Counsel focused on a particular freelancer for dramatic effect, but the result of the ALJ's decision is that the *News-Press* is obligated to bargain over the content of the paper. The Act is secondary to the Constitution. Yet again an ALJ has trampled on the *News-Press*'s First Amendment rights.

1. THE *NEWS-PRESS* MAINTAINED THE STATUS QUO

The *News-Press* historically contracted freelancers to fill a need. (Tr. 561). In 2005, the *News-Press* contracted with 73 different freelancers for both photography and writing purposes. (RESP. 848). The *News-Press* contracted with 79 freelancers in 2006, and 86 freelancers in 2007 for the same purposes. (*Id*).

The unrebutted testimony and record evidence demonstrated that the *News-Press* had a long history of utilizing employees, directly-hired temporary employees, freelancers, stringers, editors, and Associated Press articles to provide content for the *News-Press*. (Tr. 553-54, 548, 948-49, 2957; G.C. 211-30, 261; RESP. 922, 1120). Mr. Steepleton testified that daily, on average, the *News-Press* carried approximately 100 stories; roughly 20-30 stories were stories written by employees. (Tr. 590-91). Therefore, 70-80 percent of the content of the *News-Press* was provided by non-employee sources. Even former employees Blake Dorfman volunteered that the *News-Press* utilized "a host of stringers[6]" to cover sports stories. (Tr. 948-49).

The ALJ acknowledged that using freelancers was the status quo at the *News-Press*. (ALJD 62:7-11). The ALJ twisted facts, however, and failed to recognize that freelancers performed "investigative" work and/or the work analogous to that performed by Mr. Eringer. Under either analysis, the *News-Press* maintained the status quo.

When an employer has a past practice with regard to a mandatory subject of bargaining, then it only must bargain with the unit's representative when it intends to make a significant

[6] The term "stringer" is "a freelance person. It's a fancy term for freelance person." (Tr. 548).

change. *See DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). If the employer has established such a past practice, then it is free to continue to observe the practice without bargaining. *See Exxon Shipping Co.*, 291 NLRB 489, 493 (1998). The *News-Press* historically contracted with freelancers; the record was replete with examples. (Tr. 553-54, 548, 948-49, 2957; GC 211-30, 261; Resp. 922, 1120). Contracting with Eringer was more of the same.

The use of freelancers has always been at the discretion of the *News-Press*. The designation of GCC/IBT as the bargaining representative of a select group of employees did not serve to destroy the management rights of the *News-Press* to determine the need for freelancers. There is no authority to suggest otherwise.

The notion that the use of freelancers was somehow "retaliatory" was frivolous. Again, freelancers were used before GCC/IBT ever entered the scene. (RESP. 1120). There was no departure from past practice by utilizing freelancers. Rhetorically speaking where was the retaliation if no employee lost work or a job? (Tr. 565).

The ALJ's assessment that the *News-Press* contracted with Eringer in derogation of its obligation to bargain was unfounded. Precedent establishes that there is no duty to bargain unless and until there is change. At the *News-Press*, there had been no change regarding the use of freelancers. This allegation should be dismissed.

2. THE ALJ VIOLATED THE *NEWS-PRESS*'S FIRST AMENDMENT RIGHTS.

The ALJ (as has become the agency's habit) played short shrift to the Constitution and the *News-Press*'s rights under the First Amendment. The ALJ's findings conflict with the First Amendment. The ALJ concluded that the *News-Press* had an obligation to bargain over the content of the paper. GCC/IBT has no right to bargain over the content of the newspaper; the issue is not a mandatory subject of bargaining. *See Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1990)(protection of a newspaper lies at the core of

publishing control). In *First National Maintenance Co. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court declared that in establishing what issues must be bargained, Congress had no expectation a labor organization or the employees it represented would become an equal partner in the running of the business enterprise. *Id.* at 676. The Court stated:

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business and must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice."

First National Maintenance Corp., 452 US 666, at 679.

The *News-Press* was and is free to publish the news as it desires it to be published and decides who does and does not write for the publication. *See Associated Press v. NLRB,* 301 U.S. 103, 133 (1937). The ALJ ignored these rights.

The ALJ's even characterized the *News-Press*'s First Amendment rights as "frivolous." (ALJD 64:36). The continued full frontal assault on the *News-Press*'s First Amendment rights is astounding. Under the guise of the Act, the ALJ attempted to undermine the *News-Press*'s fundamental rights. By virtue of the ALJ's conclusion that Eringer's article "was clearly a new arrangement for which there was no previous history," the ALJ acknowledged that the issue was one of content, not employees' terms and conditions of employment. (ALJD 64:23-24).[7] The ALJ's finding served to obligate the *News-Press* to bargain over any new content in the newspaper. If the *News-Press* chose to add a Spanish-language page to the newspaper, for instance, according to the ALJ, this "arrangement" (read, content) would be a subject of bargaining. Not even the most Draconian application of the Act stands for such an absurd proposition.

[7] In addressing this ALJ error, the *News-Press* does not admit that contracting with Eringer – a freelancer – was a new arrangement for which there was no previous history.

Editorial control is a fundamental right. The ALJ trampled on this right by subjecting business and editorial decisions to bargaining. The ALJ's findings conflict with the record and the Constitution. The Board can correct this grievous error. The allegations should be dismissed.

VI. ALLEGATIONS PERTAINING TO MRS. MCCAW'S AUGUST 22, 2008 LETTER

The ALJ concluded that in an August 22, 2008 letter from Mrs. McCaw the *News-Press*, violated Section 8(a)(1) of the Act. (ALJD 75:17-20). The General Counsel called no witnesses with respect to this allegation positing the issue to be a purely legal matter. The letter was protected by Section 8(c) of the Act. Further, the *News-Press* explained how an unrepresented employee who had been stalked complained when an NLRB representative contacted her on her personal cellular telephone. The ALJ engaged in no 8(c) analysis. The allegation should be dismissed.

A. THE FACTS SURROUNDING THE LETTER

Unrepresented *News-Press* employee Amie Fowler received a message on her personal cellular telephone from a female purporting to be from the NLRB sometime in August 2008. (Tr. 3072). Ms. Fowler's personal cell phone number was not publically available; she took great care in protecting her telephone number because she had been stalked by two individuals before moving to Santa Barbara. (Tr. 3073, 3075). Ms. Fowler was "annoyed and angry" about being contacted by the NLRB. (Tr. 3074). The message indicated that the caller wanted to discuss her temporary employment at the *News-Press* when she was employed by Office Team. (Tr. 3073). Ms. Fowler was particularly piqued because "I didn't have any correlation to the newsroom upstairs so I didn't understand why I had been contacted." (Tr. 3075). Ms. Fowler contacted her supervisors and informed them that she was concerned how someone obtained her personal phone number. Ms. Fowler was particularly concerned that the *News-Press* had

provided the caller her personal cell phone number. (Tr. 3075-76). Ms. Fowler's supervisors "told me that it was my decision whether I'd like to contact the NLRB or not and they would address the issue to Human Resources to find out if, you know, maybe the *News-Press* had given my number out or not." (Tr. 3076).

The *News-Press* had no tolerance for harassment. (Tr. 3287). Human Resources Director Yolanda Apodaca received Ms. Fowler's report from Ms. Fowler's supervisor Ms. Moore, and Ms. Apodaca conveyed Ms. Fowler's complaint to Mrs. McCaw. (*Id*). In a discussion with Mrs. McCaw, Ms. Apodaca recommended notifying all employees that the NLRB was contacting employees and assure them (the employees) that the *News-Press* did not share their private and personal information with anybody. (Tr. 3288). Ms. Apodaca explained that she viewed Ms. Fowler being contacted as a "harassment issue." (*Id*). Thereafter, Ms. McCaw distributed the August 22, 2008 letter. The letter read, in relevant part:

> Dear *News-Press* Employees,
>
> Some disturbing news has recently come to my attention. I was just informed that an agent of the National Labor Relations Board (NLRB) has contacted *News-Press* employees directly, including on their personal cellular telephones.
>
> We have previously addressed the NLRB's unfair treatment of the *News-Press* in a letter to the NLRB General Counsel Meisburg in Washington D.C. outlining the biased treatment that the *News-Press* received.
>
> Rest assured that neither I nor any of senior management has divulged any personal or other contact information about any non-newsroom employees to the NLRB. As I previously informed the newsroom employees, we are required by law to give confidential information (salary, address, and other personal information) for the newsroom employees to the NLRB and the Teamsters union (which represents only the newsroom employees). Unfortunately, I do not know what the Teamsters and/or the NLRB had done with that newsroom employee information. However, I am committed to protecting the privacy of every employee here at the *News-Press*.
>
> I cannot direct you not to speak with the NLRB's agents should they, in some way, contact you. However, please note that the *News-Press* has retained lawyers for these matters. As a *News-Press* employees [sic], you may state to the NLRB

> agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers.
>
> If you do not feel comfortable with speaking to the NLRB agents, you may feel free to tell them you do not wish to talk with them. These are only some of the options available to you.
>
> I ask that you not be afraid or intimidated by the NLRB's "investigation" tactics. As it has been the union's position, so it seems that the NLRB would see us give up our First Amendment rights by prosecuting meritless charges, if only to try and make up for Judge Wilson's rebuke of those same tactics. We will not give up our First Amendment rights, to the NLRB, Teamsters or anyone else, nor will we submit to any intimidation against our employees from anyone.
>
> I will not belabor the point any further than to say that I am very disappointed that employees that are not represented by the Teamsters have been contacted directly. Should any of you have any questions or concerns to share, please contact Ms. Apodaca in our Human Resources Department so that we can alleviate any fears or concerns you may have.

(G.C. 124). Ms. Apodaca testified that the August 22, 2008 letter was not intended to prohibit any employee from voluntarily speaking with the NLRB. (Tr. 3288).

B. DISCUSSION AND ANALYSIS

1. THE LETTER WAS PROTECTED PURSUANT TO SECTION 8(C) OF THE ACT.

The letter was protected expression under Section 8(c) of the Act:

> … the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. §158(c).

An employer has the right to freely "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit'." *The Levy Co.*, 351 NLRB 1237, 1239 (2007)(citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)). Unfair labor practices predicated on speech must be carefully scrutinized; speech is considered a

privilege if it contains no threat or promise. *See NLRB v. Marine World USA*, 611 F.2d 1274, 1277 (9th Cir. 1980). There was no threat or promise of benefit in the August 22, 2008 letter.

Section 8(c) of the Act codifies the First Amendment of the Constitution of the United Sates of America in the Act. *See Gissel*, 395 U.S. at 617, *accord, e.g. Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1428 (2nd Cir. 1996). The *News-Press* described the facts of the NLRB investigation to its employees and expressed its opinion and views in a printed, written, graphic, visual form – a letter.

In *Marine World USA*, the court remanded a Board decision and found that written statements distributed to employees by the employer, which were critical of the union and on their face did not threaten reprisals of force or promise benefits depending on the outcome of union election, could not be characterized as unfair labor practices. *See Marine World USA*, 611 F.2d at 1277. The same logic applied in the instant case.

The *News-Press*'s letter communicated its opinion and criticized the NLRB. The letter expressed sympathy towards unrepresented employees already contacted by the NLRB. Lastly, the letter informed employees of the choices they had should an NLRB agent confront them. Significantly, nowhere in the letter did the *News-Press* direct employees to not cooperate with the NLRB.

The content of the letter had no threat of reprisal of force or promise of benefit. The language indicated an intention to inform. The *News-Press* reacted to a complaint by a rattled employee who was concerned that the *News-Press* had provided her personal contact information to the NLRB. The *News-Press* addressed a legitimate concern via the letter. By writing the letter, the *News-Press* availed itself of its First Amendment rights to address the First Amendment and California Constitutional rights of privacy of its employees. The non-coercive

nature of the letter clearly fell under the protection of Section 8(c). Accordingly, it was not a violation of the Act for the *News-Press* to distribute the letter to its employees.

2. THE *NEWS-PRESS* HAD THE RIGHT TO INFORM ITS EMPLOYEES OF THEIR RIGHTS

The *News-Press* felt it appropriate to communicate to all of its employees that it was not the culprit in divulging employees' private contact information. In particular, the letter stated, "… I am committed to protecting the privacy of every employee at here at the *News-Press*." Nothing in the letter urged employees to refuse to cooperate with the Region's investigation of the charge. Nothing in the letter threatened employees, either explicitly or implicitly, for communicating with the NLRB. There were no unlawful promises in the letter, either. The letter informed employees that speaking to the Region was optional.

To the knowledge of the *News-Press*, there is no obligation to cooperate in an NLRB investigation. In fact, the Agency regularly dismisses charges due to the failure of a party to cooperate in the investigation. The ALJ's hostility towards the *News-Press* availing itself of the First Amendment smacks of systematic bid by the agency to infringe upon the *News-Press*'s fundamental rights.

In *Baptist Med. Ctr.*, 338 NLRB 346, 347 (2002), the Board stated, in reference to a communication from an employer to employees:

> The question, therefore, is whether the memorandum reasonably tended to interfere with employees' access to the Board. We conclude that, in all the circumstances, it did not.

In *Baptist Med. Ctr.*, the company distributed two memorandums, one on April 7, 2000, and another on April 20, 2000. The April 7 memorandum stated, in part, that if employees were contacted by a government investigator, the employees had the right to talk or to decline to talk with the investigator, the right "to seek the advice of a lawyer before doing so," and requested that the employees inform the employer if "you receive a grand jury subpoena or are contacted

by investigators regarding a matter involving any Health Midwest Company in any way." *Id*. After a charge was filed, on April 20, the company distributed a second memorandum. The April 20 memorandum clarified that employees were free to talk to an NLRB investigator, if the employee wanted; the employees did not have to inform management of any NLRB contact; there would be no discipline for not informing the company of any NLRB contacts; and encouraged employees to tell the truth to an NLRB agent. (*Id*). ***The Board stated that only if the language in the memorandum were taken out of context did the company violate the Act.*** *Id*. at 348. Nothing in either memorandum in *Baptist Med Ctr.* could reasonably been construed to interfere with an employee's access to the Board. As a result, the allegations were dismissed.

In the same way, nothing in the August 22, 2008 letter could have reasonably been construed to interfere with an employee's access to Region 31. The letter was in response to an unrepresented employee complaining about an NLRB agent contacting her on her private phone. The August 22, 2008 letter did not ask any employee to report contact with the NLRB; the letter did not threaten employees for NLRB contact; nor did the letter discourage employees from cooperation, should NLRB contact an employee. The letter specifically stated, "I cannot direct you not to speak with the NLRB's agents should they, in some way contact you." (G.C. 124). The August 22, 2008 was succinct, in this regard. Only if the language in the August 22, 2008 letter was taken out of context could it be construed to violate the Act.

In *NLRB v. J.W. Mortell Co.*, 440 F.2d 455, 457 (7th Cir. 1971), the court rejected the notion that notices informing employees of the non-mandatory nature of a Board agent's request to meet and help prepare for a hearing violated the Act. The court explained that two notices did not convey the impression of surveillance or interfere with the Board's processes. *Id* at 461-62 (Concurrence adopted by the majority). The court opined that the Board's interpretation was "an

unduly strained one."[8] *Id* at 457. At issue in *J.W. Mortell Co.* were subpoenas issued to approximately 100 Mortell employees prior to a hearing. *Id* at 459 (Concurrence adopted by the majority). The company posted a notice on its bulletin board offering to answer any questions about the subpoenas. (*Id*). Included with each subpoena was a letter from a Board agent requesting that the employee confer with the General Counsel at the motel where he was staying. (*Id*). The company informed at least one employee that whether she met the Board agent at the motel was strictly up to her. *Id* at 459-60. Additionally, the company posted a second memorandum on a company bulletin board stating:

> Once again employees have asked the Company if they must go to the motel of the government lawyers about the union case. Feel free to go to the motel or feel free to stay away. No one can legally pressure you either way. Some of you have been told you will be held in court by the government lawyers for four or five days. This is only a union pressure tactic to force you to go to the motel. We honestly do not believe the government lawyers will hold you in court just to punish for not going to the motel. You might be required to wait in court several hours but we are confident that an orderly arrangement will be worked out. We sincerely regret these latest union pressure tactics, and we hope you will bear with us until this whole thing is concluded. Feel free to go to the motel or feel free to stay away.

Id at 461 (Concurrence adopted by the majority). The court specifically found "Mortell's written communication and actions were well within the ambit of freedom of expression permitted by 29 U.S.C. § 158(c)." *Id*. There was no evidence that Mortell's memorandums interfered with employees' rights or that the General Counsel was unable to fully present the case at the hearing.[9] The same rationale applied to the instant case.

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[8] The court noted that there was undeveloped evidence about the General Counsel having difficulty contacting witnesses. 440 F. 2d at 460. In the instant case, there was no evidence in this regard.

[9] The court also made mention of Board member Zagoria's finding that the notices in question were lawful. Zagoria specifically noted that the notices "were temperate in tone," and there was no evidence to demonstrate that the notices were calculated or designed to convince employees to not cooperate with the Board. This was different from *Certain-Teed Prods. Corp.*, 147 NLRB 1517 (1964).

3. THE *NEWS-PRESS* OFFERED NO LEGAL REPRESENTATION TO EMPLOYEES.

Nothing in the August 22, 2008 letter could reasonably be construed as an offer of legal representation to employees. Again, only a strained, unreasonable, reading of the letter – taken out of context – could support the assertion that the letter constituted an offer of legal representation. The language relied on by the ALJ read:

> As *News-Press* employees, you may state to the NLRB agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers.

This was not a solicitation. The General Counsel offered no evidence to even suggest that through the letter Mrs. McCaw acted as an agent for counsel in an attempt to engage in a legal relationship. At most, the language was clumsy; the language is not unlawful.

In *Florida Steel v. NLRB*, 587 F.2d 735, 751 (5th Cir. 1979), the company distributed a letter that read:

> … in addition, if a National Labor Relations Board agent should drop in on you, you may ask for an opportunity to obtain legal counsel before you talk to him.
>
> ***
>
> Again, if you should want some legal counsel, or just help in handling any of the situations described above, all you need to do is let your supervisor know. He will put you in touch with someone who can help you.

The court concluded that the letter only offered employees assistance in securing legal counsel if the employee should want and request such help. The court rejected the Board's assertion that the letter was coercive, compulsory, and a restraint on employee rights. *Id* at 751. The court explained that nothing in the letter required or compelled an employee to do anything. *Id*. Furthermore, there was no proof that any employee was actually coerced or compelled to do anything or that any employees' rights were restrained by the letter. *Id*.

The same rationale applied to the *News-Press*'s August 22, 2008 letter. The letter stated, "You ***may*** state to the NLRB agent or any Teamster operative that attempts to contact you …"

The letter in no way compelled employees to do anything. There was no requirement, there was no coercion, there was no threat of reprisal, nor was there any threat of force accompanying the suggestion of what to say to an unwanted NLRB agent who contacted an employee.

With all due deference, it also bears noting that the interpretation of a letter is a question of law that is to be decided by a court; the interpretation in construction of a letter by the Board is not binding on a court. *See Florida Steel*, 587 F.2d at 751 (citing *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1256 (5th Cir. 1978); *J.W. Mortell Co.*, 440 F.2d at 461 (citing *Celanese Corp. v. NLRB*, 291 F. 224, 226 (7th Cir. 1961)). Courts have systematically concluded that letters like *Santa Barbara News-Press*'s do not violate the Act.

Furthermore, employees do have the right to obtain legal counsel before speaking to a Board agent. In *J.P. Stevens & Co. v. NLRB*, 449 F.2d 595 (4th Cir. 1971), the court rebuked the Board, stating, "The holding of the Board that the company distributed the letter 'for the purpose of obstructing Board investigations' is nothing but pure speculation in the imagination on the part of the Board, as there is nothing in the record that supports or even tends to support such a holding." *Id* at 751. Again, there is no evidence that *Santa Barbara News-Press*' August 22, 2008 letter obstructed anything. There is certainly nothing in the record to support – or which even tends to support – the notion that the *News-Press* distributed the August 22, 2008 letter to obstruct an NLRB investigation. This allegation should be dismissed.

VII. ALLEGATIONS PERTAINING TO THE DECEMBER 3, 2008 MEETING IN THE NEWSROOM

The ALJ did a disservice to the record to conclude that at a meeting on December 3, 2008, a *News-Press* supervisor violated the Act by "establishing" a productivity requirement requiring employees to produce at least one story a day, and instructed employees not to discuss their terms and conditions of employment. (ALJD 89:11-12). The facts did not bare out these allegations. The ALJ relied on the testimony of one witness – GCC/IBT agent Karna Hughes –

to support his findings. He disregarded the testimony of four other witnesses and 43 performance reviews that referenced a one-story per day expectation at the *News-Press*. Furthermore, Hughes' lament about working more was unfounded; she worked no more after the December 3, 2008 meeting.

With respect to the allegations pertaining to employees being prohibited from discussing their terms and conditions of employment, there was no evidence to suggest that any employee was instructed to not discuss terms and conditions of employment. In fact, *News-Press* policy-explicitly stated that employees were permitted to discuss terms and conditions of employment. It was unreasonable to conclude that the *News-Press*'s desire to keep trade secrets confidential, and an instruction to employees directing them not to share new business directions with potential competitors, as an admonition to discuss terms and conditions of employment. An honest application of the Act compels the dismissal of both of these allegations.

A. BACKGROUND AND FACTS

1. NEW DIRECTOR OF NEWS OPERATIONS DON KATICH ARRIVES AT THE *NEWS-PRESS*

On September 15, 2008, the *News-Press* hired Don Katich as the Director of News Operations. (Tr. 3193-94). Katich was hired to "develop a resource and a strategy for deciding and covering news for the paper," and to be responsible for the other areas of media owned by Ampersand, including Ampersand's radio station, web content, and other weekly papers. (Tr. 3193, 3195-96).

In mid-September, 2008, Mr. Katich and Assistant Editor Scott Steepleton had lunch at Paradise Café in Santa Barbara and discussed the newsroom. (Tr. 2870-71, 3196-97). Among the topics discussed were "who the key players were, who the managers were, who the writers were, some of the basic structure that's in place within the newsroom, primary areas of

responsibility or of expertise, productivity, schedules. It was the first real opportunity that Scott and I had to talk about how the newsroom operated." (Tr. 3198).

Mr. Steepleton explained to Mr. Katich which reporters did news features, topical or daily news, how much work was put in on average, where people lived, and what the average production was for employees in the newsroom. (Tr. 2872; 3198-99). Mr. Steepleton explained to Mr. Katich that on average, employees produced approximately one article a day in the course of a given week. (Tr. 2872; 3199). Mr. Steepleton also informed Mr. Katich that many employees in the newsroom exceeded this expectation. (Tr. 3199).

B. THE DECEMBER 3, 2008 NEWSROOM MEETING

1. MR. KATICH ANNOUNCES LAYOFFS AND CLOSURES OF SISTER PUBLICATIONS

On December 3, 2008, Don Katich held a meeting in the newsroom of the *News-Press*. (RESP. 861; Tr. 3201-02, 1353, 1693-94, 2873, 3169). Between 20 and 25 employees attended the meeting. (Tr. 3201-02, 1353, 1693-94, 2873). By all accounts, Mr. Katich commenced the meeting by informing employees in the newsroom that Ampersand (the *News-Press*'s parent company) was closing down the *Goleta Valley Voice* and the *Santa Ynez Valley Living* and that there had been layoffs, but that the newsroom would not suffer any layoffs. Mr. Katich explained the purpose of the meeting:

> On the 3rd of December, Ampersand announced the layoffs of 17 members – or employees of Ampersand not in the newsroom. And I wanted to provide some assurance to the people in the newsroom that those layoffs would not affect them in any way.

(Tr. 3203). Mr. Katich further explained that due to the anxiety that the layoffs would likely occur, as well as the "tsunami of economic changes":

> It was my motive, my object to give some hope, some guidance to both managers and bargaining unit employees within the newsroom that was – that these layoffs would not affect them and that there was some plan,

> some hope, some direction of how we would work together to insure that we stay viable as a news organization.

(Tr. 3203-04).

The *News-Press* issued a press release about the closure of the *Goleta Valley Voice* and *Santa Ynez Valley Living*. (RESP. 1114). Mr. Katich incorporated the press release into notes he prepared in advance of the meeting. (RESP. 1111). At the meeting, Mr. Katich read only the press release verbatim from his notes. (Tr. 3208).

2. MR. KATICH EXPLAINS HOW THE *NEWS-PRESS* WOULD TASK RESOURCES GOING FORWARD AND REMINDS EMPLOYEES THAT THE INFORMATION IS A TRADE SECRET.

After announcing that there would be no layoffs in the newsroom, Mr. Katich explained that the information he was providing at the meeting was a "trade secret." (Tr. 3209). Mr. Katich explained "… the purpose of that was to hopefully insure that the words that I spoke, the direction that I communicated to the newsroom would not appear in the blog-sphere[10] or in our competition as – as did the report about the 17 layoffs." (Tr. 3209). In fact, a local, competing news blog reported the layoffs of the *News-Press*. (RESP. 1113). Mr. Katich further explained why he used the term "trade secret" at the December 3, 2008 meeting:

> … every news organization, be it Santa Barbara or elsewhere, if I can talk more in generalities – I mean everyday, we're in the fight of our lives as far as fighting for the hearts and souls of our customers. And our customers here in Santa Barbara are news customers.
>
> ****
>
> It's terribly important that any organization has hope that tomorrow's going to be a better day. On the other hand, I did not want what I said to tip off the competition how we were going to operate, how we collect news, what our focus

[10] Former employee Blake Dorfman, in his August 15, 2008 resignation email to the Human Resources Director Apodaca, even stated "…and I will keep my decision confidential while I'm here (in China) so the dumb blogs don't go crazy." (RESP. 160a). GCC/IBT representative Nicholas Caruso also stated that his information about the layoff of Mr. Richard Mineards was "based on a local area blog…" (Tr. 1990; G.C. 112). *See also* G.C. 114.

> would be, how we were going to attempt to dominate the news market. I mean, that's not – I mean, to me that is the definition of trade secrets.

(Tr. 3213-14).

City Editor Scott Steepleton testified that the *News-Press* had competitors:

> *The Independent*, there's a website called "NoozHawk," there's a sport's website called Presidio Sports. There's television stations. There's the *405 Daily Sound, Costal View News.* I mean, there's lots of competitors in various mediums in this area. *L.A. Times* can be a competitor depending on how big – we had Jesse James Hollywood the other day – the *L.A. Times* can be a competitor to us depending on the size of the story or the scope of the story.

(Tr. 2884-85). Mr. Steepleton explained why the *News-Press* does not share with competitors how it intends to cover the news or task its resources to cover the news:

> Because we're competitors and we want to be the best and the biggest and we'd like to see them go away if we could.

(Tr. 2885).

Mr. Katich testified, unequivocally, that he did not use the word "requirement" in describing employee productivity. (Tr. 3221). In fact, of the five individuals who testified about the meeting, only one, Ms. Hughes, testified, initially, that Mr. Katich used the term "requirement" or "required." (Tr. 1695). In fact, Ms. Hughes' embellished response accused Mr. Katich of saying that the standard went into effect "immediately." (Tr. 1695). No other witness corroborated this testimony.

Ms. Hughes did, however, corroborate what Mr. Katich informed employees about the direction of the *News-Press*. Ms. Hughes explained:

> [Katich] basically told us that he was sure we could understand he wanted everything – that what he was going to say should be considered a "trade secret." And then he started talking about how he wanted to make sure that the *News-Press* was the – had the best content of any of the competing media outlets, so he wanted to make sure that any story that we wrote was better than any competitor's story … he also talked about how he wanted to have a appropriate and

> proportional coverage for the different communities in our area, so that would include Montecito in Carpinteria Santa Ynez and Goleta.

(Tr. 1695).

Ms. McMahon testified that Mr. Katich:

> Talk[ed] about the dire straits of the newspaper industry and that the *News-Press* had to work harder than ever to keep its readers and that one of the ways he wanted to do that was to make sure that we had as much local news as possible. He wanted everybody to write one story a day, so we didn't have to run house ads …

(Tr. 1354). Ms. McMahon testified that she recognized that Mr. Katich "was trying to basically rally the troops around the flag," and "trying to inspire the reporters," through his speech. (Tr. 1415). Ms. McMahon also testified that she was aware that the *News-Press* had a confidentiality policy that had been in place since Mrs. McCaw purchased the paper in 2000. (Tr. 1417). The policy is in the handbook. (G.C. 125 at 43-44).

Dave Mason testified that he recalled Mr. Katich using the term "proprietary" with respect to the information voiced at the meeting. (Tr. 3170-71). Mr. Mason testified:

> Okay. What he (Katich) had discussed to us – what he had asked us not to discuss this matter outside of the room. He said that what was said in that room should stay in that room. So, he didn't want us discussing that, you know, out in the open, where it can be picked up by the competition.

(Tr. 3171). Mr. Mason never interpreted Mr. Katich's statement that the information was confidential to mean that he could not discuss the meeting with other persons in the newsroom. (Tr. 3172). Mr. Mason explained:

> My impression was that I could not – I should not be discussing it out in the open. I shouldn't be talking to other newspapers about it, I shouldn't be going, you know, out in the public and talking about it in a way that would be picked up by other media.

(Tr. 3172).

What was not said in the meeting also bears mentioning. Katich never prohibited employees from talking to GCC/IBT. (Tr. 3233, 3173, 1764). Katich never said that employees

should not talk to each other about the contents of the meeting. (Tr. 3172-74, 1764). Similarly, there was no abrogation of the Employee Handbook, or its provisions.

3. THE *NEWS-PRESS* HAD AN EXPECTATION REGARDING PRODUCTIVITY

An employee could not simply show up to the *News-Press*, do nothing, and expect to be paid. (Tr. 2894). In fact, since 2000, the *News-Press* regularly addressed employee productivity, referencing the expectation of about one story per day.

On October 2, 2001, the *News-Press* gave newsroom employee Vicki Adame a disciplinary letter, critical of the lack of work she was performing. (RESP. 761; Tr. 2866). Prior to the warning, the *News-Press* warned Ms. Adame about her lack of productivity. (Tr. 2867). Ms. Adame was expected to produce at least one story a shift, and she was failing in that endeavor, thus the warning. (Tr. 2868).

In addition, the *News-Press* communicated and addressed productivity expectations in performance reviews:

1. RESP. 747 (P 8) – 2000 performance review of GCC/IBT bargaining committee member Tom Schultz that stated "usually writes a story a day during weekdays and a story (or two) and briefs on Saturday."

2. RESP. 748 (P 7-8) – 2000 of Rhonda Mainville that stated, in relevant part "productivity is fine. I can usually count on a single, well-written, thoughtful, comprehensive, and intelligent from this reporter, and sometimes, a brief story in addition."

3. RESP. 749 (P 7) – 2000 performance review of June Rich that stated, in relevant part, "I can usually count on a single, well-written, smart and well-researched story a day from June and often a brief or two as well."

4. RESP. 750 (P 7) – 2000 performance review of GCC/IBT bargaining committee Nora Wallace that stated, in relevant part, "Nora is extremely productive and regularly writes a story or two a day. On occasion, she's done three stories in a single day."

5. RESP. 751 (P 8) – 2000 performance review of Vicki Adame that stated, in relevant part, "As a general assignment night reporter, Vicki is called upon to write or to contribute two stories on a daily basis."

6. RESP. 752 (P 8) – 2000 performance review of Jose Louis Jiminez that stated, in relevant part, "Jose writes an abundance of well-crafted daily court stories, news features, and briefs."

7. RESP. 753 (P 8) – 2000 performance review of Camilla Cohee that stated, in relevant part, "Camie writes breaking news stories daily and, on a consistent basis, writes features, explanatory pieces, projects and investigative pieces on complex subjects."

8. RESP. 754 (P 2) – 2000 performance review of Chuck Schultz that stated, in relevant part, "Chuck does a good job of turning around daily stories and covering spot news stories to which he is regularly assigned…(and) Chuck isn't the fastest writer in the room."

9. RESP. 755 (P 8) – 2000 performance evaluation of Morgan Green that stated, in relevant part, "Morgan is extremely productive, generally writing a story or two a day. I can always count on a story from her on a slow day."

10. RESP. 756 (P 6) – 2001 performance review of Chuck Schultz that stated, in relevant part, "Chuck can be relied on most of the time to come up with a daily, and he is better than most at keeping his city week updated, but we are hoping to see as many as two stories a day from his beat."

11. RESP. 758 (P 6) – 2001 performance review of GCC/IBT activist Melinda Burns that stated, in relevant part, "Melinda is very good at both churning out dailies and researching and writing the more complex stories."

12. RESP. 759 (P 6) – 2001 performance review of Barclay Brantingham that stated, in relevant part, "Barney does five columns a week."

13. RESP. 760 (P 6) – 2001 performance review of Jose Louis Jiminez that stated, in relevant part, " Jose is prolific, producing at least one story a day and usually more."

14. RESP. 762 (P 2) – 2002 performance review of Hildy Madina that stated, in relevant part, "she's supplied dailies and weekenders on the North-South split…"

15. RESP. 763 (P 6) – 2002 performance review of John Zant that stated, in relevant part, "John was asked this year to increase his column output to a consistent three times a week and he has met that challenge. He has done this while continuing his normal tasks, such as producing our daily bullpen column…"

16. RESP. 764 (P 6) – 2002 performance review of Maria Zate that stated, in relevant part, "I can count on her to file a story everyday and sometimes she files 2 or 3 stories."

17. RESP. 765 (P 2) – 2002 performance review of Barclay Brantingham that stated, in relevant part, “Barney does 5 columns a week.”

18. RESP 766 (P 3) – 2003 performance review of Nora Wallace that stated, in relevant part, “she could handle one or two dailies and work on a weekender or two.”

19. RESP. 767 (P 3) – 2003 performance review of General Counsel witness Scott Hadley that stated, in relevant part, "…able to work on dailies and longer pieces at the same time.”

20. RESP. 768 (P 3) – 2003 performance review of Frank Nelson that stated, in relevant part, "turns out a decent number of dailies.”

21. RESP. 769 (P 1-2) – 2004 performance review of Barney McManigal that stated, in relevant part, "We’d like to see him produce more daily and weekend pieces off his beat.”

22. RESP. 770 (P 2) – 2004 performance review of GCC/IBT bargaining committee member Tom Schultz that stated, in relevant part, "he is especially productive when it comes to dailies, easily handling two stories.”

23. RESP. 772 (P 1) – 2004 performance review of Hildy Madina that stated, in relevant part, "Hildy turns out a good volume of daily stories. We’d like to see more weekend stories…”

24. RESP. 773 (P 1) – 2005 performance review of Barney McManigal that stated, in relevant part, "…now that he’s grown comfortable here, his production has picked up and many days, he produces two average-length stories. Some Saturdays, he eclipses even that.”

25. RESP. 774 (P 2) – 2005 performance review of General Counsel witness Scott Hadley that stated, in relevant part, "because the metro desk asked Scott to work at least one editing shift each week and because the desk often assigns him to difficult daily and weekend stories, he has not done the major investigative projects that he would like to do.”

26. RESP. 775 (P 1) – 2005 performance review of Karna Hughes that stated, in relevant part, "because little is known about Public Square is pulled together, but it appears 5 days a week and on time, perhaps a follow-up time audit is in order…the Public Square part of Karna’s job was not intended to be a full-time job, preventing her from contributing more features, more sidebars, and Local takes. That didn’t happen.” And “That Public Square appears without fail on Page 2 everyday in a process that is usually transparent to me, suggests that Karna is doing an excellent job” and “Karna and her features editor will work to ratchet up her contributions to the Life section. Her editor’s goal: at least one feature of varying length per week.

27. RESP. 776 (P 3) – 2005 performance review of Mark Patton that stated, in relevant part, "He maintains his three-column per week routine while producing Valley Living feature, a weekly tennis notebook, regular features, prep coverage and UCSB men's basketball coverage."

28. RESP. 779 (P 1) – 2005 performance review of Nora Wallace that stated, in relevant part, "Her ability to generate three stories a day for extended periods is a genuine asset to the newsroom."

29. RESP. 778 (P 2) – 2005 performance review of GCC/IBT activist Dawn Hobbs that stated, in relevant part, "Dawn did a prodigious amount of work during the Jackson investigation and trial. She filed a steady stream of daily and weekend stories and regularly scoped the competition."

30. RESP. 781 (P 2) – 2006 performance review of Melissa Evans that stated, in relevant part, "In the 11 months that I worked in the newsroom in 2006, I have written an average of 5 to 7 stories a week, except when I have projects and other large packages to work on."

31. RESP. 796 (P 6) – 2008 performance review of Karna Hughes that stated, in relevant part, "And whether she's doing a feature or asked to turn around a newsy daily, she is able to pull it off." And "writing long pieces is Karna's way; however, writing more pieces would be preferred."

32. RESP. 1042 (P 4) – 2007 performance review of Michael Moriatis that stated, in relevant part, "Michael consistently makes his daily photos available for editors to review at the 2:30 news meeting. He gets photo proofs into the hands of reporters so they can write captions."

33. RESP. 1044 (P 4) – 2007 performance review of Steve Malone that stated, in relevant part, "always delivers more images than we can use. Steve is the hardest worker in the department."

34. RESP. 1045 (P 3) – 2007 performance review of Mike Eliason that stated, in relevant part, "Mike ask [sic] for a heavier workload of assignment daily and transmits from the field, meeting all deadlines with a minimum of supervision processing and transmit photos…" And "Mike constantly makes his daily photos available for editors to review at the 2:30 news meeting. When wild art is requested even late in the day, Mike will come up with a picture." (*Id* at 4).

35. RESP. 1090 (P 3) – 2008 performance review of Marilyn McMahon that stated, in relevant part, "Her features sparkle; her briefs and short items often read like the press releases from which they come…Marilyn should strive for more, shorter pieces verses fewer, longer pieces."

36. RESP. 1092 (P 3) – 2008 performance review of Dennis Bateman that stated, in relevant part, "Dennis contributes so much to the paper, from his prep reports to his designing. He is a shining multi-tasker, which makes him a terrific producer."

37. RESP. 1093 (P 3) – 2008 performance review of Tom De Walt that stated, in relevant part, "I would like to see him contribute more to the Life section."

38. RESP. 1100 (P 4) – 2008 performance review of Steve Malone that stated, in relevant part, "always delivers more images than we can use. Steve is the hardest worker in the department."

39. RESP. 1101 (P 2) – 2008 performance review of Mike Eliason that stated, in relevant part, "Mike is able to turn more assignment [sic] around in one day than anyone in the department without giving up quality or missing deadlines consistently." And "Mike consistently makes his daily photos available for editors to review at the 2:30 news meeting and e-mails them for posting on the web for breaking news. When wild art is requested, even late in the day, Mike will come up with a picture that's different and interesting to look at."

40. RESP. 115A (at 4) – 2004 performance review of Nick Masuda that stated, in relevant part, "he delivers far more than the minimum required" and that Nick should "concentrate work on daily output, design, special section. Especially, develop a consistent look for all seven days of the week."

41. RESP. 115E (P 36) – 2004 performance review of Marilyn McMahon that stated, in relevant part, "when I asked for a time audit after she went to the 4 days a week, Marilyn's response was coy. I would like Marilyn to contribute at least one major feature and a secondary feature a week in 2005…."

42. RESP. 115F (P 40) – 2004 performance review of Mark Patton that stated, in relevant part, "Mark's output is impressive. He easily handles three columns a week. He covers the local tennis scene thoroughly. He volunteers to write features on a weekly basis…."

43. RESP. 115J (at 71) – 2004 performance review of Barney Brantingham that stated, in relevant part, "Barney meets his obligations and occasionally writes an extra piece. Barney writes frequent travel pieces for the Sunday paper that should also be noted."

44. RESP. 115Q (P 114) – 2004 performance review of GCC/IBT activist Melinda Burns that stated, in relevant part, "Melinda's productivity is far below other reporters because of the time she puts into her projects. We would like to see her do more daily stories off her beat, along with quick weekend pieces that take a few days, rather than weeks."

One story per day was nothing new at the *News-Press*.[11]

[11] The General Counsel subpoenaed these documents. (ALJ 8 at 11, para. 47).

C. ARGUMENT

1. THE ALJ'S ERRORS

The ALJ erred in his definition of a "trade secret." (ALJD 85:20-21). As an initial matter, every witness testified that a trade secret was, essentially, information about how the *News-Press* planned to allocate its resources and get "a leg up" on the competition. A trade secret is:

> A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information – including a formula, patter, compilation, program, device, method, technique, or process – that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use; and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.

Black's Law Dictionary, 8th Ed. (2004). Katich had every right to expect that a trade secret would not be shared with competitors. The record reflected that employees knew this.

The ALJ confused "trade secret" with terms and conditions of employment, although no record evidence demonstrates any confusion between the two. The ALJ made an extraordinary leap to conclude that by referencing "trade secrets" that Katich meant "terms and conditions of employment." This was an unreasonable interpretation of the record – again no employee testified to anything remotely along these lines. There was no restriction upon employees regarding the discussion of terms and conditions of employment; the restriction was for employees to refrain from sharing with competitors how the *News-Press* planned to task its resources to obtain a competitive advantage over rival news organizations. There was no "ambiguity" as determined by the ALJ. (ALJD 86:20-21). The ALJ erred.

Furthermore, the ALJ incredibly determined that an explicit provision of the employee handbook that Ms. McMahon testified familiarity with, and was the subject of an employee protest, was immaterial because "the language of the employee manuals read long before and

doubtless stuck by those employees in the back of the employees' desk drawers" was forgotten. (ALJD 87:5-7). This was an incredible conclusion, utterly devoid of fact. This dismissive statement flew in the face of reality and reflected the proverbial "hack job" designed to produce a result, rather than administer the Act. Employees well knew of the confidentiality policy in the handbook, and the provision that made it clear that employees were entitled to discuss terms and conditions of employment with themselves and with a union.

With respect to the purported "change" in productivity, there was no empirical data to support the idea that any employees worked more or that productivity changed. Employees' hours remained constant before and after the meeting. The ALJ concluded that the *News-Press* implemented something "new" in the form of standards, yet cited no record evidence to support such a notion. The ALJ ignored the documentary and testimonial evidence demonstrating that the *News-Press* had historically expected one story per day, per employee. And, the *News-Press* assured GCC/IBT that no employees would be expected to produce more stories than an historical standard. There was no change from the past. The ALJ erred in sustaining this allegation.

2. *SANTA BARBARA NEWS-PRESS* DID NOT ANNOUNCE A NEW PRODUCTIVITY STANDARD ON DECEMBER 3, 2008; THE *NEWS-PRESS* EXPECTED EMPLOYEES TO BE PRODUCTIVE, AS DEMONSTRATED BY PAST PRACTICE

Well before Mr. Katich arrived at the *News-Press* in September 2008, the *News-Press* expected employees to be productive. Employees had been warned (Tr. 2866; RESP. 761), and it had been communicated to employees, in writing, during performance evaluations, that employees were expected to make at least one contribution a day. (RESP. 115A, 115E, 115F, 115J, 115Q, 747-56, 758-60, 762-70, 772-76, 1042, 1044, 1045, 1090, 1092-93, 1100-01). In fact, employees were lauded for making more than one contribution a day. Mr. Katich announced nothing "new."

Mr. Katich announced no "requirement." Mr. Katich's notes reflect that he associated the term "responsible" with the expectation of one story per day. The General Counsel's own witnesses, Ms. McMahon and Ms. Hughes, conflicted with each other in this regard. Only Ms. Hughes testified that Mr. Katich used the word "requirement;" in fact, Ms. Hughes embellished her testimony by stating that Mr. Katich announced "immediately" a new standard was effective. (Tr. 1695). No other witness testified that Mr. Katich said anything remotely that dramatic at the December 3, 2008 meeting.

Significantly, every employee that testified stated that Mr. Katich did not announce any productivity expectation as an ultimatum. (Tr. 2880, 2881). Additionally, no employees were ever disciplined subsequent to the meeting for failure to adhere to the purported standard expressed at the meeting. (Tr. 3182, 3226).

Ms. Hughes lamented on how she had to work harder after the December 3, 2008 meeting, and even went so far as to suggest that she was working overtime (Tr. 1705). However, an examination of Ms. Hughes' timecards reflected that she worked a grand total of one hour of overtime from December 2008 through June 2009. (RESP. 978). What Ms. Hughes' timecards did reflect, however, was that she took a total of 136 hours of combined sick leave, vacation time, and time off to attend collective bargaining negotiations in that span.

In fact, an examination of all employees' timecards for the 12-month period of June 2008 through June 2009 demonstrated no increase in hours worked. (RESP. 1066-69, 1070-77). Essentially, Ms. Hughes complained about being more efficient and productive during the workweek as a result of the *News-Press* asking her to write more, shorter stories rather than fewer, longer stories. (Tr. 1703-05).

Fellow employee Dave Mason explained that he understood exactly what the *News-Press* wanted from Life Section reporters – the *News-Press* was more interested in shorter, less in-

depth stories, and greater frequency than longer, detailed stories. (Tr. 3180-81). Mr. Mason explained that what the *News-Press* wanted was for the employees in the life section to provide "generally a one-source story. You can make a phone call and crank out a story. That's turned out to be the case." (Tr. 3181). Mr. Mason further testified that the eight hours of work he averaged prior to the December 3, 2008 has not increased since the December 3, 2008 meeting. (Tr. 3181).

No "productivity requirement" was established or announced at the December 3, 2008 meeting. The General Counsel provided no evidence, aside from bald conclusory assertions by biased witnesses, to support this wild allegation. It is troubling to think that the Act can be twisted to stand for the proposition that an employer cannot exhort its employees to be the most productive employees possible; the General Counsel, in bringing this Amended Consolidated Complaint, seeks this exact end. The December 3, 2008 meeting was designed to be a pep rally and inspire employees. Ms. McMahon, called by the General Counsel, acknowledged this. (Tr. 1415). The Act should not be interpreted to preclude an employer from encouraging employees to be productive.[12]

Mr. Katich sought the most efficient use of resources so that the content of the *News-Press* would give the *News-Press* a competitive advantage over other media. Significantly, there was no discipline issued, and the *News-Press* informed GCC/IBT that no employee would be disciplined for failing to meet goals greater than historic productivity standards. (G.C. 103). Nothing in the Act prohibits an employer from expending its resources in the manner it deems most efficient.

Further, in *The Trading Port Inc.*, 224 NLRB 980, 983 (1976), the Board reiterated its holding in *Wabash Transformer Corp.*, 215 NLRB 546 (1974), both of which are applicable to

[12] "Feather-bedding" actually violates the Act. *See* Section 8(b)(6) of the Act.

the instant dispute. In *Wabash*, the Board dismissed 8(a)(5) and 8(a)(1) allegations alleging: the company unilaterally imposed efficiency standards; for the first time interviewed employees about their efficiency; and discharged employees as a means of enforcing productivity. In *Wabash*, as well as *The Trading Port*, there were preexisting published standards. However, the Board stated, "By acknowledging [that the company's actions changed terms and conditions of employees], yet declining to find an unlawful refusal to bargain, ***the Board, in* Wabash*, in effect, endorsed a substantial degree of flexibility and management independently to fashion innovations promoting a more efficient work force***." 224 NLRB at 983 (emphasis added). The Board explained that a company is entitled to make unilateral changes based on established standards and past practice, and impose discipline. *Id*. Thus, even assuming the *News-Press* made a "unilateral change," the *News-Press* was so entitled because the productivity standard was no different than past levels of productivity. The long list of Performance Reviews and disciplinary warnings demonstrated that the *News-Press* had established standards.

3. *NEWS-PRESS* EMPLOYEES ARE FREE TO DISCUSS THEIR TERMS AND CONDITIONS OF EMPLOYMENT; NO REASONABLE PERSON COULD INTERPRET ANYTHING SAID AT THE DECEMBER 3, 2008 MEETING TO CONSTITUTE A PROHIBITION AGAINST EMPLOYEES DISCUSSING TERMS AND CONDITIONS OF EMPLOYMENT

Prior to the December 3, 2008 meeting with employees in the newsroom, Mr. Katich reviewed the *News-Press* employee handbook. (Tr. 3209). In particular, Mr. Katich familiarized himself with the following provisions:

> **CONFIDENTIALITY**
>
> Employees may have access to confidential information about the *News-Press* business, advertisers and news stories before their publication. It is essential that the confidentiality of these matters be maintained and protected at all times.
>
> For this reason, preprinted or advanced sections of the newspaper may not be taken out of the building in any matter or in form, including without limitation digital copies. Any confidential information acquired as the result of employment

> with the *News-Press* may not be used for personal advantage or profit, nor be divulged for the advantage or profit of anyone else.

(G.C. 125 at 32). GCC/IBT agent Ms. McMahon admitted knowledge of this handbook provision. (Tr. 1417). Furthermore, as is relevant to the instant matter, the handbook states in an Addendum:

> **CONFIDENTIALITY POLICY**
>
> Employees may have access to confidential information about the *News-Press* business, advertisers and news stories before their publication. It is essential that the confidentiality of these matters be maintained and protected at all times.
>
> This includes the unauthorized disclosure, release, sharing or leaking of any proprietary, personnel or other information involving the *News-Press* to any other news organization or media outlet.
>
> Such disclosures are strictly prohibited and will be subject to disciplinary action, up to and including immediate termination.
>
> Any confidential information acquired as the result of employment with the *News-Press* may not be used for personal advantage or profit, nor be divulged for the advantage or profit of anyone else.
>
> In addition, preprinted or advance sections of the newspaper may not be taken out of the building in any manner or in any form, including without limitation digital copies.
>
> **FOR CLARIFICATION PURPOSES**
>
> Over the past few days, we heard people describe our confidentiality policy in an inaccurate manner. Our policy is aimed at protecting our proprietary business information of the paper, our reporting and copyrighted materials and [sic] that are so disloyal, reckless or maliciously false so that they would damage [sic] paper's reputation as a quality news product in the community. These are things that are vital to the health of the paper and our collective interests.
>
> ***Nothing in the policy can be or should be construed so as to prevent our employees from discussing with each other their wages, hours and other conditions of employment for mutual aid and protection. Our employees have had a long history of internally voicing their opinions directly or through their chosen representatives. We have always respected the rights of our employees to do so and to discuss with each other.***
>
> As most of you know, a group of employees are seeking to bring the [sic] a union to represent them. We have been told that they have discussed *News-Press* affairs

> with the union for the purpose of considering whether that union would make an appropriate collective bargaining representative. We also know that some of you [sic] spoken to the media about your desire for unionization. This too is not prohibited by our policy nor is any communication protected by the National Labor Relations Act. Similarly any communication with any governmental agency for the purpose of enforcing or protecting employee rights also is not prohibited.
>
> If you have any questions regarding this policy, please feel free to raise them with me for clarification.

(GC 125 at 43-44).

This allegation is a sham that should be dismissed. The topics discussed by Mr. Katich, at the December 3, 2008 meeting dealt with focusing the resources and content of the *News-Press* and how the *News-Press* planned to re-task its resources. In fact, GCC/IBT sent an accusatory letter on December 4, 2008, laced with rhetoric, stating:

> …Mr. Katich apparently instructed the employees that everything said at the meeting was "proprietary," had to stay in the room and could not be shared by anyone outside, without exception. Aside from the fact that the *News-Press* itself issued a press release describing at least some of what was discussed at the meeting, much of the content of the meeting cannot lawfully be suppressed, since employees have the right to discuss their terms and conditions of employment *clearly a topic at the meeting yesterday* with their union representatives and others who did not attend the meeting. As you know, Michael, we have been down this road before, * at least with a 'gag order' that the *News-Press* significantly modified on the eve of the filing of a ULP charge in July, 2006, and with the December 15, 2006 inquisition following the disclosure of Ms. McCaw's December 26, 2006 memo, which would have been protected if disclosed to the media by any newsroom employee. Again, this is to request that the *News-Press* rescind or clarify to its employees its position on what employees may disclose to non-*News-Press* employees without negative consequence to them.

(G.C. 99 at 2)(asterisks in original). On December 19, 2008, the *News-Press* responded, in relevant part:

> Your December 4, 2008 letter raises two issues and reflects inaccurate information that has apparently been passed on to you. *The Goleta Valley Voice* has been incorporated into the pages of *Santa Barbara News-Press*. You referenced a press release describing this new direction; this fact was stated in that press release.

> In the meeting you referenced, Dan [sic] Katich informed reporters that the information pertaining to the business strategy of *Santa Barbara News-Press* was proprietary and confidential. Employees were informed of how management has decided to reorganize the content of the newspaper, as well as how management intends to dedicate resources. This information was considered a trade secret that is confidential and proprietary information that *Santa Barbara News-Press* expected employees to not share with any competing news outlets.
>
> *Santa Barbara News-Press* is well aware of employees' right to discuss terms and conditions of employment with GCC/IBT, and in no way were employees directed to withhold any information relating to terms and conditions of employment from GCC/IBT. You are re-plowing tilled soil, here. We have been down this road before. To the extent an employee interpreted anything to reflect such a prohibition, that employee's interpretation is unreasonable and unsupported. Of course employees can discuss terms and conditions with the union and among themselves.
>
> Finally, with respect to "a new policy that reporters will be required to run a minimum of one article per day," such a goal was announced to employees. There is no new "policy." Your letter appears to recognize this by referring to the "pre-existing practice and policy…" *Santa Barbara News-Press* does not intend to discipline any employees for failing to meet goals that are greater than historic productivity standards.

(G.C. 103 at 3).

Don Katich did not discuss employee's terms and conditions of employment. Rather, he discussed a new direction and focus of the *News-Press* and how the *News-Press* intended to allocate resources. No witness described a term or condition of employment at the meeting. The ALJ's Decision glossed over this fact. This fatal flaw was a ground to dismiss the allegation.

The test regarding a rule, assuming *arguendo*, that one was promulgated at the December 3, 2008 meeting, was explained by the Board in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), where the Board explained that the test be whether a rule would ***reasonably*** tend to chill employees in the exercise of Section 7 rights. No employee testified that anything said by Mr. Katich at the December 3, 2008 meeting chilled any Section 7 right. Ms. Hughes' testimony was

devoid of any fact suggesting her Section 7 rights were somehow chilled.[13] Ms. McMahon's testimony had no evidence of any Section 7 right being chilled. No reasonable person could understand anything Mr. Katich said to chill employees' rights under Section 7 of the Act.

Significantly, in *Lafayette Park Hotel*, the company promulgated a rule that prohibited employees from divulging "hotel private information" to unauthorized individuals. *See* 326 NLRB at 826. The Board rejected the notion that this prohibition could be reasonably interpreted to prohibit the discussion of wages, benefits, and terms and conditions of employment. (*Id*). Significantly, and as it applies to the instant matter, the Board recognized that the hotel had substantial and legitimate interests in maintaining the confidentiality of private information, such as guest information, trade secrets, contracts with suppliers and things of the like. And even though the term "hotel private" was undefined, it was unreasonable to believe that "hotel private" encompassed the discussion of wages. (*Id*). The *News-Press*, too, had demonstrated, legitimate reasons to keep its news-gathering strategies and resource allocation secret from competitors. The term "trade secret," as used by Mr. Katich at the December 3, 2008 meeting did not prohibit employees from discussing terms and conditions of employment.

There was no evidence to suggest that any employee understood Mr. Katich's statement at the December 3, 2008 meeting to supersede the Employee Handbook. Ms. McMahon knew that the confidentiality policy had been in place since Ms. McCaw purchased the newspaper. (Tr. 1417). Ms. McMahon acknowledged that she saw the confidentially policy before the

[13] In fact, Ms. Hughes asked for a meeting to discuss Mr. Katich's statement that employees would be responsible for one contribution per day, ***not*** to discuss any confusion about what Mr. Katich meant by the term "trade secret." This was an admission that Ms. Hughes understood what Mr. Katich meant, and that she was free to discuss terms and conditions of employment with GCC/IBT and/or her co-workers. It stands to reason that if Mr. Katich announced a "new" policy about confidentiality, Ms. Hughes would have inquired about it, as well. Ms. Hughes' absence of inquiry demonstrated that Mr. Katich said nothing to cause one to believe that employees were proscribed from discussing terms and conditions of employment with GCC/IBT or among themselves.

December 3, 2008 meeting. (Tr. 1422). No reasonable person could interpret anything that Mr. Katich said to prohibit employees in their exercise of Section 7 rights. *Cf. Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (even if a rule does not explicitly restrict Section 7 activity, the rule is unlawful if employees reasonably construe the language of the rule to prohibit Section 7 activity; the rule was promulgated in response to union activity; the rule was applied to restrict Section 7 activity).

Where a rule does not refer to Section 7 activity, the Board explained that it will not conclude that a reasonable employee will read the rule to apply to protected activity simply because the rule was susceptible to such an interpretation; such an approach would require an unfair labor practice finding whenever a rule could conceivably be read to cover Section 7 activity, even though the reading was unreasonable. *See* 343 NLRB at 647. And remember, Karna Hughes requested a meeting with her supervisor only to clarify, in her mind, what Mr. Katich meant with respect to the story per day expectation. (Tr. 1698-99). Ms. Hughes did not seek a meeting – or even ask any questions – about what Mr. Katich meant by "trade secret." This lack of inquiry, on the part of Ms. Hughes, was because she understood that Mr. Katich expected employees to keep confidential the information he shared at the December 3, 2008 meeting about the news content and resource allocation of the *News-Press*.

VIII. ALLEGATIONS PERTAINING TO 2008 PERFORMANCE REVIEWS

Human Resources Director Yolanda Apodaca and Photography Supervisor Raphael Maldonado explained that the *News-Press* did conduct performance evaluations of employees for 2008. (Tr. 1904, 3101-02; RESP. 1100, 1101). In fact, neither the General Counsel nor GCC/IBT asked any questions of Ms. Apodaca or Mr. Moldanado in response to this fact. (Tr. 3107-08).

The *News-Press* conducted performance evaluations for employee work performed in 2008. (RESP. 1089, 1090, 1092, 1093, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1108).

The *News-Press* met with bargaining unit employees in May 2009 although the performance evaluations were completed by December 2008. (Tr. 3130-31, 3278-79). The *News-Press* modified the performance evaluation form for all employees except bargaining unit employees and it took time to transfer the information from the old forms to the new forms for all employees except bargaining unit employees. (Tr. 3151). The *News-Press* decided to provide all employees – including bargaining unit employees – their 2008 performance evaluations at the same time. (Tr. 3277-78). In so doing the *News-Press* maintained the status quo.

The ALJ claimed two issues with the *News-Press*'s decision to maintain the status quo: 1) meetings provided an opportunity to change supervisors' minds; and 2) the delay reduced the likelihood of changing a supervisor's mind. (ALJD 93:40-94:5).

This theory conflicts with *The Toledo Blade Co.*, 295 NLRB 626 (1989) enf. denied sub nom *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990) and on remand 301 NLRB 498 (1991), where the court overturned the Board and concluded that the ability to directly negotiate individual retirement and separation incentives with employees was a permissive, non-mandatory subject of bargaining. *See* 907 F.2d at 1223. The court explained that an employer may only directly deal with employees after first obtaining the consent of the union, and ***any employer that directly negotiates with an individual employee, without first bargaining with a union, violates Section 8(a)(5) of the Act***. *Id*. (internal citations omitted).

The ALJ determined to impose a process whereby the employee and managers individually negotiate performance review scores. Directly negotiating with employees is a permissive, non-mandatory subject of bargaining. There is no obligation to bargain over

changing a permissive, non-mandatory subject of bargaining. This tenet was explained in the seminal case of *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185, 92 S.Ct. 383, 400, 30 L.Ed.2d (1971):

> We need not resolve, however, whether there was a "modification" within the meaning of §8(d), because we hold that even if there was, a "modification" is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining.

The Court reiterated:

> … §8(d) embraces only mandatory topics of bargaining … just as §8(d) defines the obligation to bargain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective bargaining agreement.

Id. at 185-85; 401.

And, the Board recognized that there was no violation of Section 8(a)(5) of the Act where there is no divergence from the status quo. *See, e.g., Matheson Fast Freight, Inc.*, 297 NLRB 63 (1989) ; *A-V Corporation*, 209 NLRB 451 (1974). Further, in *Motor Car Dealers Association of Greater Kansas City*, 225 NLRB 1110 (1976), the Board stated:

> It follows, of course, that a company does not violate Section 8(a)(5) in this respect where there has in fact been no change from the status quo, *or where the change does not relate to a mandatory subject of bargaining*. Thus, to prove a violation, the General Counsel must prove that the Respondent initiated a change from the status quo affecting a mandatory subject of bargaining without first giving the Unions a reasonable opportunity to bargain concerning it. Failure to establish these facts by a preponderance of the evidence necessarily requires dismissal of the allegation.

Id. at 1112 (emphasis added).

IX. ALLEGATIONS PERTAINING TO WAGE INCREASES

A. BACKGROUND

Wage increases were never guaranteed or automatic at the *News-Press*; rather, discretionary wage increases were dependent on many factors. The employee handbook stated:

PERFORMANCE MANAGEMENT SYSTEM

> ***… Performance reviews are only one of a number of factors that are considered in determining compensation. Other factors may include, but are not limited to merit, position, and general business and economic conditions. Any and all compensation increases are at the sole discretion of the News-Press***.

(G.C. 125 at 15)(emphasis added). The employee handbook expressly stated, "***any and all compensation increases are at the sole discretion of the News-Press***" and explained that ***general business and economic conditions*** affect how and whether the *News-Press* compensated its employees. This policy was effective October 2000, which predated the July 2006 election involving GCC/IBT.

It was also a misnomer to describe wage adjustments as "merit" increases. The status quo policy was that factors include performance reviews, merit, position, and general business and economic conditions. Merit was but one factor among many.

1. "GENERAL BUSINESS AND ECONOMIC CONDITIONS"

Well before GCC/IBT entered the scene at the *News-Press*, the *News-Press* communicated to employees poor business conditions and difficult economic conditions. In a February 14, 2005 memorandum from then-publisher Joe Cole to *News-Press* employees, Mr. Cole explained, in relevant part:

> I'm writing to ask for more help and give you straight information about the *News-Press* as a business. Many of you have been intimately connected with the paper for years and work diligently to improve its service and value to our community. You deserve to hear more about the *News-Press*'s new place in a radically changing information and business environment.
>
> **Continuing Circulation Declines:**
>
> It's no secret readers have been moving away from reading our traditional daily newspaper. Each day, readers have more and more choices, some cheaper, some easier to access and some more directly with what they individually want to know.

Advertisers Are Following Readers Away from Our Newspaper

Since reader and advertiser habits are shifting, we'll have to change as well. Otherwise, over time, our service to the community erodes and we won't stay healthy as a business.

****

Profitable Revenue Growth:

In a "mature" business like newspapers, two popular methods of maintaining financial health are to:

(1) Continually cut all expenses and costs;

(2) Increase operating efficiencies by finding better ways to do things, including sometime with the help of new technologies.

We'll continue to work hard on those two disciplines, but we'll also focus increased effort on the third leg of the stool: profitable revenue growth. This means seeking, year after year, sustained advances in sales, beyond the increases needed just to stay even with annual inflation and expense increases.

We're at a size where we'll have to achieve new incremental sales of sometimes more than $1 million – each year – just to beat inflation in a material way.

Much of our revenue growth will have to come organically from our existing main lines of business; classified ad sales, retail ad sales, sales of the physical newspaper and outside printing jobs. An expanding amount will have to come through developing new products to anticipate the new ways customers want to receive information and to reflect the ways advertisers want to reach those consumers. Our different departments will have to work better together than ever before, including cross-selling products whenever possible.

Increasing profitable revenues in "real terms – after annual inflation – is critical so we can provide everyone at the *News-Press* with secure career opportunities. You will therefore see a number of new activities to support revenue growth – from investments in training, new technologies, service improvements and product improvements.

****

Please Send Me Your Ideas and Insights:

****

And speaking of circulation, two weeks ago I asked our management team to forward me any ideas or insights you might have to improve our circulation. We are most interested in increasing the quality circulation valued most by our advertisers, that is, long-time loyal readers buying home subscriptions. I'm also

> interested in improvements we can make for our single copy buyers. I received a number of wonderful suggestions, a number of which we are implementing. Thank you.
>
> Circulation and sustained revenue growth are intertwined. Some of our major advertisers, for example, are now pushing harder than ever before to pay less for retail advertising as our circulation declines. A recent contract submitted by a major retailer even attempted to do this mathematically – as circulation decreased, the rate would automatically go down proportionately.

(G.C. 166).

Nine months later, market conditions had not improved. As explained by then-Editor Jerry Roberts in a November 30, 2005 email to employees that stated, in relevant part:

> All,
>
> As we gear up for Performance Reviews season, I want to remind everyone about the content, framework and process of this annual end-of-year exercise.
>
> As you all know, Ampersand places considerable importance on performance reviews, both as tools in helping improve the paper and as one factor among several that is used to determine compensation.
>
> ****
> As you all know, the newspaper industry, and our paper is no exception, is being buffeted and transformed by seismic economic shifts, broad cultural changes, and sweeping, disruptive technologies.
>
> The clearest evidence of the impact of this tsunami of change immerges from the numbers and trends for paid circulation, which continues to decline for daily papers across the country.
>
> Industry wide, circulation declined 2.6 percent daily over the past year, and 3.1 percent for Sunday. Those figures are virtually mirrored by *News-Press* circulation losses during the same period. 2.6 percent daily and 3.9 percent Sunday.
>
> There are, of course, many and complex reasons for this decline, which merely accelerated a long-term national and local trend; the fragmentation of the mass audience for a general interest publication because of new technologies; the "time famine" and other changes in peoples' lifestyles; the availability of billions of alternative sources of news and information; the growing disconnect from citizens and civic life, to name a few.
>
> In addition, there are a number of operational factors contributing to the circulation decline, which the publisher and his circulation committee are working

> to address at the *News-Press*: difficulties in our single copy distribution and sales; a substantial "churn rate," that while improving, still results in more people stopping the paper than starting it each month; the lack of new sales channels to replace those we lost when national telemarketing restrictions took effect.
>
> It is clear to any fair-minded person that the quality of our paper, and of our journalism, are higher today than they were just a few years ago, and that is to the credit of our newsroom. But it also [sic] true that the newsroom must accept our share of responsibility for the decline in circulation. If we were producing a paper that was so compelling, so relevant, so useful and so aligned with the interests of our readers, our circulation trend would not be what it is.
>
> Even though paid circulation counts for only a fraction of the revenue generated by our colleagues on the business side, it is the crucial marker on which our business model ultimately depends. As the circulation number goes down, advertisers, who provide the bulk of our revenue, increasing are unwilling to pay the same –let alone higher – ad rates we charge them for a larger audience just a few years ago.
>
> As a practical matter, this means that despite our improvements, we, as journalists, need to get better, smarter, faster, and more in touch with our readers and do so in a hurry.
>
> George and I are in the process of digesting the rather bulky results of the Mori Research study. As soon as we're done, we'll report back to you about what the readers are telling us about the paper, as well as the results of our in-house survey, that will show how our views resemble or differ from those of the readers.
>
> In the meantime, given the uncertainties of the future, performance expectations for everyone in the company, and in the newsroom, will, by necessity, continue to be higher.
>
> This means that professional performance that may have been "good enough" in years past may no longer be acceptable, as we position and move ourselves to meet the considerable challenges we face.
>
> A final note: I know everyone is wondering about year-end compensation. I've asked the publisher, who told me his goal is to have these issues resolved by the end of the year. When I hear more, I'll let you know as soon as I can.
>
> As always, I'm here to listen and talk if you have questions or comments.

(G.C. 167).

Roberts' November 30, 2005 letter was the second time in a nine-month span – all of which predated GCC/IBT – that the *News-Press* explained to employees that hostile economic

market conditions and declining circulation had a negative impact on overall revenue. Thus, in 2005, on two occasions, the *News-Press* had already informed employees that general business and economic conditions were declining and that wage increases were threatened. The number of subscribers was dwindling, and advertising revenue was decreasing.

On January 27, 2006, Publisher Joe Cole wrote an email to all *News-Press* employees that stated, in relevant part:

> **2006 Focus**:
>
> … As I've communicated to you during the past year, it's no secret that the demographics and information habits of our market area are changing quickly. We've all seen the changes accelerate year-by-year over the past five years.
>
> Our circulation figures reflect that these changes are increasingly in favor of competing sources of news and information such as the internet.
>
> To respond, as individuals, and as an institution, we are going to have to take even bigger steps to get ahead of the curve. Remaining stagnant is no longer an option.
>
> Embracing change and practicing innovation is a huge element in enhancing the health of the newspaper, and, accordingly, providing expanded job opportunities for all of you.
>
> Despite broad new developments in 2005, change is not just a one-year push. The fact is in today's environment year-after-year change has to become a new way of doing business at the *News-Press*.
>
> ****
> **Innovation and Change:**
>
> Our practice of potentially rewarding everyone in the organization with annual cash bonuses – in every department – from top to bottom – may be innovative within the newspaper industry, but it is the norm within a wide range of other industries that face more competition than the *News-Press* has had in the past.
>
> Thank you again for your hard work and dedication in 2005. I know in 2006 we all look forward to continuing to build on our strengths to prepare for the next 100 years.

(RESP. 946 at 204). Again, the *News-Press* communicated to employees that market conditions continued to sour for the *News-Press*. Again, this predated GCC/IBT.

2. INDUSTRY EXPERT JOHN MORTON EXPLAINED THE IMPACT OF ADVERTISING AND CIRCULATION ON NEWSPAPER REVENUE

Newspaper industry expert John Morton explained that the *News-Press*'s circulation decline, and concurrent revenue decline, actually exceeded that of the national average. (RESP. 1084, 1085, 1086). Mr. Morton explained that the key sources of revenue for a daily newspaper were advertising and circulation. (Tr. 2811). Advertising typically accounted for 75 to 80 percent of revenue and all of the profit; circulation accounted for the rest. (*Id*). Mr. Morton succinctly explained:

> Most publishers hope with their circulation revenue, in other words, revenues from the subscriptions and the newsstand sales to cover the cost of newsprint and ink. Generally, that's about what it does. The bulk of it is from advertising, and that's the primary focus of the newspaper business.

(*Id*).

As a result of the unprecedented decline in revenues in the newspaper industry, in 2005, most newspaper companies imposed wage freezes (Tr. 2841) that continued into 2006, when companies resorted to laying off employees, a trend that continues to this day. (*Id*).

It was from this market backdrop that the *News-Press* did not grant wage increases to any employees – not just bargaining unit employees – for work performed in 2006, work performed in 2007, and work performed in 2008.

3. THE ALJ ERRED

The ALJ ignored the record evidence demonstrating no violation of the Act. The lack of a wage increase for work performed in 2006, 2007, and 2008, was consistent with the status quo. The status quo history was not only that within the bargaining unit, but for ***all*** employees of the newspaper. The ALJ again paid lip service to the record evidence where the *News-Press* repeatedly explained the economic circumstances that adversely affected revenue, and the direct impact on the *News-Press*'s decision to increase employee wages. Furthermore, the ALJ failed to

even address the fact that bonuses and wage increases were intertwined, and in 2007, before ALJ Kocol, the issue of bonuses was litigated. The fact that the GCC/IBT filed a charge, and the General Counsel issued a complaint that was litigated about the lack of a bonus for 2006 work constituted an administrative admission on the part of GCC/IBT and the General Counsel that GCC/IBT knew or should have known about the lack of a wage increase for work performed in 2006. The silence in the ALJ's opinion, in this regard, was deafening. Ignoring the record to produce a result is not the effective administration of the Act.

B. ARGUMENT

1. NLRB Case No. 31-CA-28161 Constituted Administrative Admission that GCC/IBT and the General Counsel Missed the 10(b) Period to File a Charge

In NLRB Case No. 31-CA-28161, a separate action, filed on or about March 15, 2007, GCC/IBT alleged that the *News-Press* failed to pay performance bonuses for calendar year 2006. (ALJ 61 at Ex. 1). The case was litigated before ALJ Kocol in August 2007. The same individual(s) that formed the basis of knowledge for filing the charge pertaining to bonuses were same individuals upon which the General Counsel relied to show the lack of a wage increase for calendar year 2006 in NLRB Case No. 31-CA-28661. Paragraphs 6(d) and 6(e) of the Amended Consolidated Complaint litigated before ALJ Kocol alleged, respectively:

> (d) About mid-December 2006, Respondent issued performance evaluations that were substantially lower than the employees' previous evaluations to the employees named below:
>
> Anna Davison — Melissa Evans
> Dawn Hobbs — Karna Hughes
>
> (e) About late December 2006 or early January 2007, Respondent failed to award performance bonuses for the year 2006 to the employees named below based on their lower performance evaluations:

Anna Davison	Melissa Evans
Dawn Hobbs	Karna Hughes

(ALJ 61 at Exh. 2). ***NLRB Case No. 31-CA-27950, et al, specifically named Dawn Hobbs and Karna Hughes as employees who failed to receive a performance bonus in 2007.***

Additionally, Ms. Melinda Burns, a witness called by the General Counsel testified that in a meeting in early 2001 with publisher Joe Cole, Mr. Cole explained "there was going to be a pool of money available for determining pay increases ***in terms of wages and bonuses***." (Tr. 279-80) (emphasis added). Ms. Burns testified that Mr. Cole, in 2001, explained "how the pool of money would be allotted for pay ***increases and bonuses***." (*Id*) (emphasis added).

The complaint in NLRB Case No. 31-CA-28161, litigated before Judge Kocol, constituted an ***administrative admission, on the part of GCC/IBT and the General Counsel, that GCC/IBT had knowledge of the lack of wage increases since about late December 2006 or early January 2007.*** Wages and bonuses were intertwined. By virtue of litigating the lack of bonuses for 2006, GCC/IBT knew or should have known about the lack of wage increases for 2006, and then 2007 and 2008. The ALJ consciously ignored this damning evidence. Instead, the ALJ invented a way to circumvent the statute of limitations and bastardize the record to salvage the General Counsel's case. (ALJD 97:16 – 100:24). This is not justice; this is bias.

2. GCC/IBT Agents Were Well Aware of the Lack of Wage Increases for Work Performed in 2006.

Wage increases were historically granted at the beginning of the calendar year and based on performance of the previous year. By the first quarter of 2007, employees knew or should have known that there were no wage increases granted for work performed in 2006. Dawn Hobbs (Tr. 1156; 1160-61; 1262-64), and Karna Hughes (Tr. 1640-42) attested to these facts during the General Counsel's case in chief. Hobbs testified that the *News-Press* terminated her employment in February of 2007. (Tr. 1155). She testified that she received a wage increase

"every year except for the last year … I received no merit wage increase for performance during 2006…" (Tr. 1160). Hobbs knew, therefore, prior to her February 2007 discharge, that she had not received a wage increase for work performed in 2006.

Hughes testified that she started working at the *News-Press* in April 2004 (Tr. 1640) and that she received merit wage increases "either at the end of the year or at the beginning of the next year. So that would be December of the year or January of the (next) year, generally" (Tr. 1642). Hughes testified that she received no wage increase for work performed in 2006; thus by her own admission she knew this by January 2007. This knowledge was necessarily imputed upon GCC/IBT at the same time. As a result, a charge should have been filed no later than September 2007. GCC/IBT filed NLRB Charge 31-CA-28667 on **February 29, 2008**, well beyond the 10(b) period. (ALJ 61 at Exh. 1).

3. THE REGION, DURING THE INVESTIGATION OF CHARGES, ADMITTED THAT THE CHARGES WERE STALE.

Section 10(b) of the Act ran prior to GCC/IBT filing NLRB Charges Nos. 31-CA-28661, 31-CA-28700, and 31-CA-29099. ***The Region, during its investigation, admitted that the allegations were stale.*** (G.C. 1(zzzz) at 1; ALJ 61 at Ex. 3)(emphasis added).

The Region, during its investigation, acknowledged that GCC/IBT filed NLRB Charge No. 31-CA-28667 based on events outside the six-month statute of limitations. In a March 14, 2008 letter, the Region acknowledged that NLRB Charge No. 31-CA-28667 charged a violation based on events that occurred at least fifteen months prior to the date of the charge. The letter stated, in relevant part:

> Specifically, the Union's evidence indicates that the Employer had a past practice of giving employees annual performance evaluations towards the end of each year. Based on those performance evaluations, ***employees either received annual wage increases and/or one-time bonuses, which went into effect January of the following year. However, beginning in late 2006 and continuing to date, the Employer discontinued this past practice.*** As a result, no employees have received annual wage increases and/or bonuses.

(G.C. 1(zzzz) at 1; ALJ 61 at Ex 3). The Region's letter affirmatively proved that GCC/IBT and the Region/General Counsel knew that the *News-Press* discontinued its merit-based wage increases in "late 2006."[14] Furthermore, the Region acknowledged that the cessation of merit-based wage increases in late 2006 coincided with the bonuses that were the substance of NLRB Case No. 31-CA-28161. GCC/IBT timely filed a charge contesting the bonuses paid out for performance in 2006. NLRB Case No. 31-CA-28667 was based on the same facts and circumstances as NLRB Case No. 31-CA-28161, however GCC/IBT filed the charge in NLRB Case No. 31-CA-28667 nearly twelve months later.

4. A CHARGING PARTY IS REQUIRED TO EXERCISE DUE DILIGENCE TO BECOME AWARE OF SUSPECTED VIOLATIONS OF THE ACT.

Section 10(b) of the Act prohibits the General Counsel from issuing a complaint in which the operative events claimed to be a violation of the Act occurred more than six months prior the unfair labor practice charge being filed and served. *See, e.g., The Arrow Line Inc.*, 340 NLRB 1, 13 (2003) (citing *Allied Production Workers Union Local 12 (Northern Engraving Corp.)*, 331 NLRB 1, 2 (2000) and cases cited therein). To determine when the statute of limitations under Section 10(b) commenced, the Board evaluates when the Charging Party has notice of, or should have realized, a suspected violation of the Act. "Where a party in the exercise of reasonable diligence should have become aware of facts indicating that the Act was violated" the proverbial "clock" starts ticking on the statute of limitations. *See Moeller Bros. Body Shop*, 306 NLRB 191, 192-93 (1992); *accord Carrier Corp.*, 319 NLRB 184, 190-93 (1995). The Board has also determined that the burden of demonstrating that a Charging Party has actual or constructive

[14] This fact explains the General Counsel's unprecedented attempt to strike portions of the *News-Press*'s Answer. (G.C. 1(bbbbb)). This pleading constituted an administrative admission that the Region's March 14, 2008 letter was an admission that proved the *News-Press*'s 10(b) defense.

knowledge of a violation of the Act falls upon the Respondent. *See A & L Underground*, 302 NLRB 467, 468 (1991). The *News-Press* met this burden; GCC/IBT and the General Counsel admitted knowledge.

In *Moeller Bros.*, the Board, in affirming the ALJ, limited recovery to six months from the date the charge was filed, even though the violations occurred for approximately six years. The Board highlighted:

> We conclude that the union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual non-compliance … it cannot with impunity ignore an employer or a unit, as the Union in this case did, and then rely on its ignorance on events occurring at the shop to argue that it was not on notice of an employer's unilateral changes … This is a case where the Union, if it had exercised reasonable diligence, would clearly have been alerted much earlier to the misconduct.

306 NLRB at 193.

In this regard, GCC/IBT's December 4, 2007 letter was instrumental in demonstrating that GCC/IBT knew that there had not been a wage increase for employees at least six months prior to the date GCC/IBT filed NLRB charge 31-CA-28661 on February 20, 2008. (G.C. 1(o)). In relevant part, GCC/IBT December 4, 2007 letter stated:

> … My recollection is that you stated sometimes the employer awards merit pay increase and sometimes it does not. I would like to know what the history has been in the Newsroom for calendar years 1/1/00 to current. ***For years when merit pay increase*** [sic] ***were not given to anyone (such as 2006), what was the reason.*** For years when merit pay increases were given or withheld, please provide the amounts and dates for newsroom employees and list employees who did not receive increases along with the explanation. Since it may take time to gather the information together, it might be best if the company went forward with the merit pay increases for now. As indicated previously, we would not view merit pay increases on bonuses as a violation of the status quo.

(G.C. 30 at 2)(emphasis added). GCC/IBT knew that there had not been wage increases for 2006. These wage increases would have been paid by February of 2007. GCC/IBT acknowledged this fact in December of 2007 – over ten months after any increase would

have been paid. The December 4, 2007 letter constituted an admission that GCC/IBT filed NLRB Charge 31-CA-28661 after the 10(b) period expired. GCC/IBT did not exercise reasonable diligence in filing NLRB Charges No. 31-CA-28661, 31-CA-28700, and 31-CA-29099. As a result, the charges should be dismissed.

5. GCC/IBT Had Constructive if not Actual Knowledge of a Lack of a Wage Increase for Work Performed in 2006 by February 2007.

Dawn Hobbs and Karna Hughes were active union supporters and agents. Their knowledge of the lack of a merit based increase constituted constructive knowledge on the part of GCC/IBT. Section 10(b)'s time limit was triggered by GCC/IBT's actual or constructive knowledge of the lack of an increase; formal/official notification from the *News-Press* to GCC/IBT was not required. *See NLRB v. Don Burgess Construction Corp*., 596 F.2d 378, 384 (9th Cir. 1979) (If the union actually knew, or by the exercise of due diligence should have known about the alleged unfair labor practice, the statute would not be tolled.)

GCC/IBT admitted in a December 4, 2007 letter that the *News-Press* did not provide wage increases for work performed in 2006. (G.C. 30 at 2). GCC/IBT also knew, through Hobbs and/or Hughes, that the *News-Press* did not provide merit-based increases for work performed in 2006. (Tr. 1154, 1160-61, 1262-64, 1640-42). Hobbs' and/or Hughes' knowledge was more than sufficient to attribute knowledge to GCC/IBT and to commence the running of the Section 10(b) time limit. *See Danzansky-Goldberg Memorial Chapels, Inc.*, 264 NLRB 840, 843 (1982)(Board found that the union first had knowledge of the surveillance on a specific date when certain pro-union employees learned of a hidden microphone); s*ee also, Vemco Inc. v. NLRB*, 79 F.3d 526, 151 L.R.R.M. 2811 (6th Cir. 1996) (Section 10(b) period began to run on date employee, who was a union supporter but not a union officer, received notice via

disciplinary action of the employer's change in a no distribution policy), and *Gratiot Community Hosp. v. NLRB, supra*:

> Where a union had actual notice of an employer's intentions at a time when there was sufficient opportunity to bargain prior to implementation of the change, the employer may not be faulted for failing to afford formal notification.
>
> In our case, the Hospital notified its employees, in writing on two occasions, that its practice of supplying laundered scrubs was being terminated. The registered nurses, therefore, including those on the Union Executive Committee, were informed that scrubs would no longer be provided. Consequently, we conclude that, ***although the Union did not receive formal notice of the change in scrub policy, it nevertheless received actual notice sufficient to satisfy the Hospital's duty to notify***.

Id. at 1260. (emphasis added)(internal citations omitted.)

GCC/IBT's failure to timely file an unfair labor practice charge constituted a waiver over this issue. *See, e.g., In Re Arrow Line, Inc.*, *supra*. By February 20, 2008 – the date of the charge in NLRB Case No. 31-CA-28661 – the bell had tolled and GCC/IBT's time had expired. The bell cannot be "unrung," yet that is precisely what the ALJ did. The allegations of Paragraphs 12(a), (b), and (c), and their corollary paragraphs of the Amended Consolidated Complaint should be dismissed.

6. THE *NEWS-PRESS* CONTINUES TO BARGAIN WITH GCC/IBT REGARDING WAGE INCREASES.

a) The Record Demonstrates Bargaining

GCC/IBT acknowledged that on November 13, 2007 – the very first day of negotiations – the *News-Press*, through Mr. Zinser, explained that the Company was coming upon year-end evaluations and that the *News-Press* inquired about GCC/IBT's position "with regard to merit increases and bonuses." (Tr. 19, 53-54). The following day, Mr. Caruso, on behalf of GCC/IBT stated:

> . . . The following day I said, our position is that we probably are not going to come to an agreement in the very near future with regard to what – to wages. In

> fact, at that time we did not have a wage proposal on the table yet, and that ***we would expect them to continue doing what they've always done***. And we asked them, what do you do? And Michael responded, well, all I can tell you is that ***some years – with regard to merit increases, some years we do it and some years we don't. We didn't do it this year . . . Oh, yes, he says it's at management's discretion as to whether we do it or not.***

(Tr. 1953-55; RESP. 347 at 2) (emphasis added).

On December 4, 2007, Mr. Caruso followed up on the issue by letter, stating, in relevant part:

> In our discussions, you asked for the Union's position on bonus pay and merit increases. Our response was ***status quo would require that you continue to do what you normally do***. When the parties reach an agreement or terms for a CBA, which may, or may not, include merit increases or bonuses, that agreement within the Agreement become [sic] effective from that point forward based on the specific terms. This being the case, I would like to know if and when the bonuses are paid for 2007, the amounts paid to the employees and the basis for the payments or lack of payment.
>
> My recollection is that you stated sometimes the employer awards merit pay increase and sometimes it does not. I would like to know what the history has been in the Newsroom for calendar years 1/1/00 to current. ***For years when merit pay increase [sic] were not given to anyone (such as 2006), what was the reason.*** For years when merit pay increases were given or withheld, please provide the amounts and dates for Newsroom employees and list employees who did not receive increases along with the explanation. Since it may take time to gather the information together, it might be best if the company went forward with the merit pay increases for now. As indicated previously, we would not view merit pay increase on bonuses as a violation of the status quo.

(G.C. 30 at 2)(emphasis added).

On January 22, 2008, via letter, the *News-Press* responded in relevant part:

> With respect to merit increases, as previously stated, the awarding of merit increases has been totally discretionary over the years, and some years they are given and some years they are not. At the present time, no decision has been made with respect to awarding merit increases in 2008 based upon performance in 2007. Additionally, should a decision be made to award merit increases, we will be making a specific proposal with respect to that subject as it relates to bargaining unit employees.

(G.C. 37 at 2).

On January 23, 2008, the *News-Press* again explained to GCC/IBT about merit increases by stating, in relevant part:

> As previously communicated to you, whether or not individuals are awarded merit increases has been totally discretionary. In some years none are awarded at all. The attached listing of Newsroom employees and their increase history makes very clear that from 2000 to the present, there have been several years in which no increases were awarded.
>
> The reason for the fact that merit increases were not awarded in certain years is strictly a matter of management discretion. Management decided that it did not wish to award increases in the particular calendar years.

(G.C. 38).

On February 25, 2008, at negotiations, the *News-Press* presented a document entitled "Position on Wage Adjustments." The document stated, in relevant part:

> During our first meetings in November 2007, *Santa Barbara News-Press* asked the Union's position with respect to wage adjustments for employees during the pendency of negotiations for our first-time Collective Bargaining Agreement. After thinking about it, the Union informed the Company that it would not object or consider it unlawful if *Santa Barbara News-Press* gave wage increases to unit employees while we are negotiating. By a letter dated December 10, 2007, *Santa Barbara News-Press* informed the union that it would evaluate the Union's proposal and get back to the Union.
>
> With respect to wage adjustments for unit employees, it is the proposal of *Santa Barbara News-Press* that any further wage adjustments are to be negotiated at the bargaining table by the Union and the Company.

(G.C. 348). Although GCC/IBT gratuitously testified to a document responding to this letter, no such document exists. (Tr. 1973-74). Thus, the *News-Press* made a proposal and GCC/IBT failed to seize on its opportunity to bargain.

The next time the issue arose was on January 15, 2009, where, in response to a verbal request made by GCC/IBT, the *News-Press* responded, in writing:

> Today the Union made a proposal that *Santa Barbara News-Press* review all current unit employees and reward merit pay increases to these individuals.
>
> The status quo in effect states:

> Performance reviews are only one of a number of factors that are considered in determining compensation. Other factors may include, but are not limited to, merit, position and general business and economic conditions. Any and all compensation increases are at the sole discretion of the *News-Press*.

Santa Barbara News-Press rejects the Union's wage increase proposal for several reasons. It is the proposal of *Santa Barbara News-Press* that in the event of any agreement to adjust wages, any such adjustments would be effective the day and date the parties sign a Collective Bargaining Agreement. The Union proposal [sic] is to give increases now prior to the conclusion of bargaining.

It has long been the position of *Santa Barbara News-Press* that, with respect to wage adjustments for unit employees, any further wage adjustments are to be negotiated at the bargaining table by the Union and Company.

One would have to be living under a rock not to recognize that the general business economic conditions are recessionary at the current time. In the newspaper industry at large, pay freezes are common. At *The Cincinnati Enquirer*, recently a recently a Teamsters unit agreed to a 10% pay cut. At the newspaper in Lansing, Michigan another union agreed to an 8% pay cut. In recent weeks, newspaper publishing companies have begun to impose furloughs. Employees are being required to take a week off without pay. In other instances employees are being required to take one day a week off without pay.

Santa Barbara News-Press is not pleading an inability to pay. Rather, *Santa Barbara News-Press* is stating that it is **unwilling** to pay wage increases at the present time or for the term of the Collective Bargaining Agreement. Our proposal is for a one-year Agreement, to be effective the day and date both parties sign the Agreement.

In view of the recession, the state of the economy in general, and the newspaper industry in particular, *Santa Barbara News-Press* is going to be reviewing all of its proposals on Wages and Benefits and intends to make new proposals at our next meeting.

(G.C. 47).

b) GCC/IBT Consented to the Status Quo

It is before this factual backdrop that the Board's decision in *TXU Electric Co.*, 343 NLRB 1404 (2004), should be evaluated. In *TXU*, the Board affirmed the ALJ and dismissed a complaint alleging that the company failed to provide an annual merit-based increase during negotiations for an initial collective bargaining agreement. *Id.* at 1404. In *TXU*, the company,

during negotiations, explained to the union that the "current wage package plan that was in effect was a status quo issue and that the structure of the plan would not change unless and until the parties reached an agreement on such change." *Id.* The union did not object to this statement or request bargaining. *Id.* The Company did not grant an annual merit-based increase for the represented employees, and increased the wages of non-represented employees by 3.6%. *Id.*

The Board recognized that *TXU* arose during the commencement of a bargaining relationship where there existed an annual review to determine whether there would be an increase in wages. *Id.* at 1405. In its analysis, the Board analyzed its decision in *Stone Container Corp.*, 313 NLRB 336 (1993) in particular the rationale that "the employer was not proposing to abandon permanently the annual wage review program, nor was it declining to bargain over how much of an increase, if any, it should give in April 1989." (343 NLRB at 1405, citing 313 NLRB at 336). The *TXU* decision recognized that the Board, in *Stone Container*, explained that an employer could lawfully decline to grant a wage increase "since the union did not request to bargain when the notice was afforded to it . . ." *Id.*; *see* also *Alltel Kentucky*, 326 NLRB 1350 (1998).

Significantly, the Board, in *TXU*, explained that in May of 1999, "the Respondent realized that negotiations might still be ongoing when December 1999 rolled around. Accordingly, the Respondent gave the Union notice that, absent agreement, its plan for unit employees for December 1999 was to continue the 1999 wages into 2000." 343 NLRB at 1406. As the Company gave the Union "ample time" to request bargaining, "it was incumbent on the Union to request bargaining over that decision." *Id.* The Board was very careful to explain that it was not suggesting impasse on a piecemeal basis, rather it addressed "a situation in which piecemeal treatment is unavoidable, at least on an interim basis. The date for annual review and possible wage adjustment was approaching. Absent a contract on that date, the Respondent had

to do *something* with respect to the matter." *Id.* at 1407 (italics in original). Further, the Board explained:

> The bargaining subject of wages is not removed from the table by the Employer's interim unilateral action. The general outline of an established annual wage review program remains in place, the Employer remains obligated to continue to bargain about wages and negotiations for an overall contract, and the parties may include this subject with others when striking deals for a final agreement. Furthermore, the exception is by definition limited to a discrete recurring event. It provides a bargaining bridge to cross the transitional period when an employer must deal with that event when engaged with initial negotiations with a newly-recognized or certified union. The principal has no broad application or disruptive potential.

343 NLRB at 1407.

Here, the *News-Press* inquired of GCC/IBT its position with respect to wage increases at the initial bargaining session on November 13, 2007. GCC/IBT stated that the *News-Press* should "continue to do what it had been doing," and to maintain the status quo. This was exactly what the *News-Press* did. The parties came to an agreement on what to do during this interim – maintain the status quo.

Assuming, *arguendo*, that the *News-Press* and GCC/IBT did not have an agreement on what to do with respect to wage increases, the *News-Press* made its position very clear, at the beginning of negotiations, that future wage increases would be negotiated at the table. (G.C. 348; RESP. 440 at 2). GCC/IBT made no proposals about wage increases during the interim period between the commencement of negotiations and the culmination of the final CBA. Therefore, assuming *arguendo* that there was no agreement for the *News-Press* to continue the status quo, GCC/IBT never seized upon its opportunity and obligation to bargain over wages for this interim. Thus, under the teachings of *TXU*, GCC/IBT declined to request bargaining over discretionary merit-based increases, although it had the opportunity to. As a result, there was no

violation of the Act when the *News-Press* declined to grant wage increases.[15] These allegations should be dismissed.

X. ALLEGATIONS PERTAINING TO DENNIS MORAN

The allegations involving Moran were sensational, given the facts adduced at the hearing. Moran testified that he, in collusion with GCC/IBT, and abetted by the General Counsel, knowingly and intentionally deceived the *News-Press* in an effort to further his allegations. Moran testified that he, GCC/IBT, and the General Counsel knew that the *News-Press*, in good faith, relied on an admitted lie perpetrated by former employee Blake Dorfman as the basis for his discharge. Rather than informing the *News-Press* of the lie, Moran, GCC/IBT, and the General Counsel did nothing. Instead of fostering justice, the ALJ rewarded GCC/IBT, Moran, the General Counsel, and Moran's deceit. In no way were the purposes of the Act effectuated in the ALJ's Decision.

The ALJ truncated the record in an attempt to lessen the overwhelming evidence that pointed to Dennis Moran as being responsible for the failure of the *News-Press* to cover the Santa Barbara Golf Classic in 2008. The ALJ narrowly focused his findings on the credibility of one witness – Editor Scott Steepleton – and failed to consider empirical evidence and unrebutted evidence to obtain an apparently pre-desired result. The ALJ went so far as to credit Blake Dorfman who admitted that he had lied to the *News-Press*, and brought with him his own personal attorney to make Fifth Amendment objections due to perjury concerns. (Tr. 988-94). The ALJ's conclusions, in this regard, were shocking. The ALJ attempted to craft an analysis that involved unrebutted facts into a credibility determination. However, one singular fact remains: Blake Dorfman lied to the *News-Press* and implicated Dennis Moran, and the *News-*

[15] This argument ignores the hostile economic realities of the marketplace in Santa Barbara and the newspaper industry, in general, that led to the *News-Press* not granting wage increases to any employees, both represented and unrepresented.

Press, in good faith, relied on Dorfman's lie. Further, GCC/IBT, Moran, Dorfman, and the General Counsel all knew that Dorfman lied to the *News-Press*; no one informed the *News-Press* of Dorfman's lie until the hearing in June of 2009.

The *News-Press* suspended Moran because an investigation into how the 2008 Santa Barbara Golf Classic failed to run in the *News-Press* revealed that Moran spoke with Santa Barbara Golf Classic Director Richard Chavez; revealed that Moran told Mr. Chavez to fax in the scores because the *News-Press* was understaffed and unable to cover the tournament; revealed that Moran failed to inform anyone at the *News-Press* of his phone call with Mr. Chavez and to be on the lookout for faxed-in golf scores; and revealed that Moran acknowledged that he spoke to Mr. Chavez, then recanted during an investigation, only to come around again and acknowledge that it might have happened. For these transgressions, the *News-Press* suspended Moran. During his suspension, the *News-Press* learned – through resigned employee (and friend of Moran) Blake Dorfman – that Moran cleaned out Dorfman's desk, which included proprietary business information. An investigation into this assertion proved Dorfman's desk had been cleaned out. Based on Dorfman's statement and a subsequent confirmation that Dorfman's desk had been cleaned out, the *News-Press* terminated Moran.

A. FACTS

1. DENNIS MORAN IS INDEFINITELY SUSPENDED FOR HIS ACTIONS IN FAILING TO COVER THE SANTA BARBARA GOLF CLASSIC

a) The *News-Press* Fails to Cover the 2008 Santa Barbara Golf Classic and the Public Complains

Sports coverage is an expected component of the *News-Press*. Subscribers expect, in particular, coverage of local sporting events, including the Santa Barbara Golf Classic – an annual amateur golf tournament the *News-Press* has covered for decades. (Tr. 2900; RESP.

833). In August of 2008, the *News-Press* failed to cover the Santa Barbara Golf Classic. This was a grievous error. The public complained about the lack of coverage. (RESP. 832 at 2).

The event organizer, Richard Chavez, also complained. Upon learning that the *News-Press* had no coverage of the Santa Barbara Golf Classic Mr. Chavez called co-publisher Mrs. Wendy McCaw "instantaneously." (Tr. 1596). His reasoning:

> I had been doing a golf show for the *News-Press* on one of their radio stations, and I had been doing it for three years without getting paid. And I felt that the least they could do was cover my tournaments. So, I was a little bit upset. I wanted to go directly to Wendy. I had never met her, but I knew she was a co-publisher. So, I went – was a little upset.

(Tr. 1596-97). Mr. Chavez left a message on Mrs. McCaw's answering machine and "very promptly" co-publisher Mr. Arthur Von Wiesenberger telephoned Mr. Chavez. (Tr. 1597). Mr. Von Wiesenberger apologized to Mr. Chavez. (*Id*). Mr. Chavez, in his conversation with Mr. Von Wiesenberger, "explained to Von Wiesenberger what had happened and recounted to him (Von Wiesenberger) a conversation that I had with Dennis in the sports department…" (Tr. 1622).

b) The *News-Press* Investigates Lack of Coverage

Thereafter, on August 5, 2008, co-publisher Mr. Von Wiesenberger sent assistant editor Scott Steepleton an email that stated, in relevant part:

> Hi, Scott,
>
> I spoke with Richard Chavez at the Santa Barbara Golf Club. He was one (of many) who was upset with the lack of coverage of the Golf Tournament, even though he had faxed information over to the paper. He was also the one who spoke to Dennis Moran.

(RESP. 791). Mr. Von Wiesenberger also telephoned Mr. Steepleton on August 4, 2008, and Mr. Von Wiesenberger told Mr. Steepleton about Mr. Chavez's phone call to Mr. Von Wiesenberger complaining about the *News-Press*'s failure to cover the Santa Barbara Golf Classic. (Tr. 2900). Mr. Steepleton informed Mr. Von Wiesenberger that he would investigate the situation. (*Id*).

Mr. Steepleton characterized Mr. Von Wiesenberger as "concerned and angry" about the *News-Press*'s failure to cover the Santa Barbara Golf Classic, particularly because:

> Dennis had apparently told Mr. Chavez that we (the *News-Press*) would cover it (the tournament), and he (Mr. Chavez) that we (the *News-Press*) didn't follow through with what Dennis had told Mr. Chavez, apparently that we (the *News-Press*) would do.

(Tr. 2901).

Thereafter, approximately one day later, on either August 5 or 6, 2008, Mr. Steepleton telephoned Mr. Chavez. (Tr. 1623, 2902). Mr. Steepleton "apologized profusely for [the *News-Press*] not covering [the Santa Barbara Golf Classic]." (Tr. 2902). Mr. Steepleton asked Mr. Chavez with whom he (Mr. Chavez) had spoken about covering the Santa Barbara Golf Classic, and Mr. Chavez responded that he had talked to Dennis about covering the tournament, as well as about faxing the scores from the tournament into the *News-Press*. (Tr. 2902-03). In contrast with the ALJ's findings, Mr. Chavez provided Mr. Steepleton with Dennis's full name – Dennis Moran. (Tr. 2903-04). This name was consistent with the Dennis that had been identified on Mr. Von Wiesenberger's email to Mr. Steepleton. (RESP. 791; Tr. 2904).

c) Assistant Editor Scott Steepleton Speaks to Sports Reporter Dennis Bateman about the Missed Coverage

Approximately one week later, Mr. Steepleton spoke to a sports reporter by the name of Dennis Bateman. (Tr. 2904). Mr. Steepleton asked Mr. Bateman if he had talked to anyone about the Santa Barbara Golf Classic; Mr. Bateman stated that he had not talked to anyone about the Santa Barbara Golf Classic. (Tr. 2905-06). Mr. Steepleton further asked if the name "Richard Chavez" was familiar to Mr. Bateman; Mr. Bateman indicated that it was not. (Tr. 2906). The conversation between Mr. Bateman and Mr. Steepleton lasted approximately 10 to 20 seconds. (Tr. 2906). Mr. Steepleton had no reason to disbelieve Mr. Bateman. (*Id*).

Mr. Bateman corroborated Mr. Steepleton's testimony. Mr. Bateman testified that Mr. Steepleton "may have" asked him questions about the Santa Barbara Golf Classic and Mr. Chavez. (Tr. 1922). Mr. Bateman agreed that Mr. Steepleton could have asked him questions about the golf tournament and Mr. Chavez, but he (Bateman) just could not recall. (Tr. 1922-23). Mr. Bateman had never covered the Santa Barbara Golf Classic, never covered the Santa Barbara City Championships, and did not know who the Golf Pro was at the city golf course. (Tr. 1921). He did not associate the name "Richard Chavez" with golf. (Tr. 1921).

d) Assistant Editor Scott Steepleton Speaks to Sports Reporter Dennis Moran about the Missed Coverage

Mr. Steepleton, thereafter, spoke to Mr. Dennis Moran about the failure to cover the Santa Barbara Golf Classic and Mr. Chavez's telephone call. The conversation occurred a few days after Mr. Steepleton's conversation with Mr. Bateman. (Tr. 2907). Mr. Steepleton explained to Moran that the *News-Press* had missed the Santa Barbara Golf Classic tournament and that Moran may have talked to someone about it. (Tr. 2907-08). Mr. Steepleton explained that he (Mr. Steepleton) wanted to figure out why the *News-Press* failed to cover the Santa Barbara Golf Classic. (Tr. 2908). Moran told Mr. Steepleton that he (Moran) "talked to Richard Chavez and that he (Moran) had also talked to Mr. Chavez about Mr. Chavez sending in the scores by fax." (Tr. 2908). Moran also told Mr. Steepleton that:

> ... at one point he (Moran) talked to Mr. Chavez about perhaps us not being able to cover [the Santa Barbara Golf Classic] because a guy that had been covering golf, Kevin Merfeld, was no longer with the newspaper and that he didn't know if we (the *News-Press*) would be able to get somebody out there on site to cover it, or at the golf course to cover it.

(Tr. 2908). Moran apologized for failing to cover the Santa Barbara Golf Classic, explaining that it "slipped through the cracks," and apologized for failing to follow up when the faxed scores that he (Moran) requested Mr. Chavez to send in did not arrive. (Tr. 2909).

e) The *News-Press* Meets with Mr. Moran on August, 23, 2008 about the Missed Coverage

Thereafter, on August 23, 2008, Mr. Steepleton, Human Resources Director Yolanda Apodaca, and the *News-Press* CFO Norman Colavincenzo met with Moran in the *News-Press* conference room for a more formal investigation into the matter. (Tr. 1472, 2909-2911). Mr. Steepleton commenced the meeting. In this regard, Moran's testimony on direct examination was illuminating. Moran testified:

> Well, Mr. Steepleton brought up ***again the golf tournament*** and asked me if I had told Richard Chavez ***before the golf tournament*** that we would not be able to cover ***the golf tournament*** this year because our staff was reduced and Kevin Merfeld had left the paper and he was our golf writer.

(Tr. 1473)(emphasis added). Moran's use of the word "again" was an admission, on the part of Moran, that Mr. Steepleton had previously talked to him (Moran) about the Santa Barbara Golf Classic. Furthermore, Moran's use of the words " the golf tournament," as opposed to "a golf tournament," further acknowledged that the golf tournament was the Santa Barbara Golf Classic.

Moran's recollection of the August 23, 2008, meeting was fuzzy; he did recall stating, at the meeting, that he had "no recollection of talking to Mr. Chavez" and that "at some point in the meeting [Mr. Steepleton] told me that decisions on what to cover should have gone through him." (Tr. 1473). Moran testified that at the end of the meeting, Mr. Steepleton informed him (Moran) that he (Moran) was suspended while the matter was further investigated. (Tr. 1474).

Mr. Steepleton testified that Moran initially denied speaking to Mr. Chavez about the Santa Barbara Golf Classic and suggested that perhaps Mark Patton spoke to Mr. Chavez. (Tr. 2912). Mr. Steepleton reminded Moran that his version of events that he recounted differed from what Moran had previously told Mr. Steepleton. (Tr. 2912). At that point, Moran changed his story and stated that perhaps he had spoken to Mr. Chavez. (Tr. 2912). Mr. Steepleton further inquired whether Moran had told Mr. Chavez that the *News-Press* was unable to cover the Santa Barbara Golf Classic; Moran

confirmed that he had. (*Id*). Mr. Steepleton asked Moran if Moran understood that Mr. Steepleton was who decided what was covered, who was sent to cover stories, how the *News-Press* covered stories, and when stories were covered, to which Moran replied "yes, I do." (*Id*). At the conclusion of the meeting, Mr. Steepleton suspended Moran, indefinitely. (Tr. 2913).

Mr. Steepleton explained that Moran was suspended because:

> Well, he admitted to talking [to] somebody outside the *News-Press* about what I consider to be proprietary information; how we cover an event, whether we cover an event, with whom we cover an event, our ability to cover an event. He appeared to change his story between whether he talked to Mr. Chavez and then blaming Mark Patton for perhaps talking to Mr. Chavez and missing it. I think that was – I mean, there seemed to be some dishonesty about it and then in combination with the information he initially admitted to, I wanted to be as thorough as I could about deciding what next…. (in addition, with respect to the Santa Barbara Golf Classic)…well, that was the incident that brought us all together to begin with. His (Moran) telling somebody that we would cover it, apparently, and not following through on the coverage of it, not letting me know that we had promised to cover it and that we wouldn't be able to cover it. I mean, that was kind of the ground zero that brought this whole thing together.

(Tr. 2920-21). Mr. Steepleton further testified:

> Q: Now, as of August 23rd, 2008, when Mr. Moran was suspended, what was your disciplinary plan, if any, for Mr. Moran?
>
> A: I had no plan at that point.
>
> Q: What were you contemplating, if anything?
>
> A: It could be a suspension; it could be a written reprimand, I was taking into account a lot of different things.
>
> Q: Were you planning to terminate Mr. Moran?
>
> A: No.

(Tr. 2921).

2. THE *NEWS-PRESS* TERMINATES DENNIS MORAN

a) Blake Dorfman, Friend of Dennis Moran, Resigns

While in Beijing, covering the Olympics, Dorfman resigned, via email on August 15, 2008, from his position at the *News-Press*. (Tr. 1022; RESP. 1602). Dorfman's resignation email stated:

> Dear Yolanda and Travis,
>
> After thinking about it thoroughly over the past few days, I have decided that the *News-Press*'s sport's coverage is not going in a direction that is conducive to my goals and overall happiness. Another opportunity has arisen, and I have made a tough but firm decision that upon my return, I will no longer be with the paper. Travis, you told me a few weeks ago that if someone didn't want to be at the *News-Press*, then they should just go.
>
> It has been a real honor to serve Santa Barbara through the paper I grew up reading. I couldn't have scripted a better beginning to my career, and I appreciate both of you so much for giving me the chance on that afternoon in July 2006. I am very sad to have been leaving my post, especially the radio show, which has been one of the most rewarding things I've ever been a part of. I will continue to provide you with the best local coverage I can through the rest of the games, both AM 1290 and the paper, and I will keep my decision confidential while I'm here so the dumb blogs don't go crazy.
>
> I wish both of you the best personally, and I also wish the paper the best as it tries to pull through these times.
>
> Sincerely,
>
> Blake Dorfman

(RESP. 1602).

b) Dorfman Had Confirmed His Loyalty to the *News-Press* Before He Left to Cover the Beijing Olympics on Behalf of the *News-Press*

Prior to Dorfman's departure to Beijing, there was an unsubstantiated rumor circulating that Dorfman planned to resign while in Beijing. Mr. Steepleton –Dorfman's acknowledged supervisor at the time – asked Dorfman, on or around August 5, 2008, if Dorfman was not

planning on returning to the *News-Press* after his trip to China. (Tr. 996-97). Dorfman told Mr. Steepleton that he (Dorfman) "wouldn't want to give up my opportunity working for the *News-Press*." (Tr. 997). Dorfman later confirmed, however, that he had lied to Mr. Steepleton. (Tr. 997, 1005-08).

Mr. Steepleton confirmed that he asked Dorfman if he (Dorfman) planned on leaving the *News-Press* after the Beijing Olympics. (Tr. 2922). Mr. Steepleton met with Dorfman approximately three or four days before August 8, 2008. (*Id*). His reason:

> An employee had told me that Blake was, that word on the street, the rumor was that Blake was going to quit the *News-Press* during his trip to China and start a competing website, sports website, and that other in the Sports Department might go with him to start this competing website.

(Tr. 2922).

Mr. Steepleton reported his conversation to co-publisher Mrs. McCaw on August 4, 2008, writing:

> Wendy,
>
> Wanted to let you know that Brad Cheng pulled me aside today to inform me that word on the street is Blake is not returning to the *News-Press* after China. (This would go against what Blake had said and what Les says.) Also, Brad Cheng said he hears the "plan" among sports reporters is to stage a walkout and launch a sports Website in Santa Barbara.
>
> Patton says he's happy here. We have Trenchard that we can pull off Scene; we have Tony Peck; we have Bateman. And I have at least two people in the works in the writing/design ranks. Also, we have the stringer AD. That should break any day.
>
> Scott

(RESP. 834). In response, Mrs. McCaw wrote:

> Scott,
>
> Have you discussed this with Blake? I think you must ask him if the rumor you heard is true. Please let me know what he says….

(RESP. 834). The next day, Mr. Steepleton spoke to Dorfman and reported the substance of his conversation to Mrs. McCaw:

> Hi, Wendy,
>
> I talked to Blake today about leaving after China, and he said, "That would be the stupidest career move of my life." He said Barry Punzal might be responsible for spreading such rumors; or Kyle Jahner (he and Blake had a falling out). "I care about this paper. It's my hometown paper," he said. He said, "It's important to me to keep local sports coverage in the paper."
>
> He says he's thankful for the radio show.
>
> Absolutely, he'll be back, he said.
>
> "This news really disturbs me."

(RESP. 835).

c) Dorfman Lies to Ms. Apodaca and Implicates Moran

Dorfman sent his resignation email only to Human Resources Director Apodaca and editor Travis Armstrong. (RESP. 160a; Tr. 1021). Upon returning from Beijing, Dorfman telephoned Ms. Apodaca. (Tr. 3338). In this telephone call, Dorfman said that he would "make himself available to meet with [Ms. Apodaca] to turn in his parking permit, access card, ID badge, pick up his final check." (*Id*). Dorfman testified:

> A: She said I have – there's something you need to sign as far as – I think it was about my last paycheck, something. needed to sign along those lines and then also she asked if I needed any personal items from my desk.
>
> Q: Did you respond to her question about the personal items?
>
> A: Yes.
>
> Q: What did you say?
>
> A: I said, no, I already asked Dennis Moran to grab some stuff from my desk and don't worry about it.

(Tr. 977).

Ms. Apodaca testified:

Q: Did you ask him anything about the personal items that he may have had in his desk?

A: Yes. I informed him that I could collect his personal belongings and have them ready for him when he came to pick up his check.

Q: Okay. And what did Mr. Dorfman say to you in response?

A: I don't remember exactly what he said.

JUDGE ANDERSON: Best description.

Q BY MR. KELLEY: Just give us your best, best recollection.

A: That wasn't necessary because he [Mr. Dorfman] already had his belongings.

****

Q BY MR. KELLEY: What did he tell you, if anything, about who cleaned out or helped him clean out his desk?

MR. GOTTLIEB: Objection. That's still leading.

JUDGE ANDERSON: What did he say, if anything, in respect to his personal items?

THE WITNESS: He advised me that Dennis Moran had already cleaned out his desk.

JUDGE ANDERSON: Did he say anything else about that desk-cleaning process?

THE WITNESS: No.

****

Q BY MR. KELLEY: When Mr. Dorfman told you that Mr. Moran helped him clean out his desk, did you think he was lying?

JUDGE ANDERSON: Did she think it then or now?

Q BY MR. KELLEY: Yeah, did you think then when Mr. Dorfman told you that, that he was lying to you?

A: No. I would not have any reason to believe he was lying.

(Tr. 3338-40).

Upon learning that Moran cleaned out Dorfman's desk, Ms. Apodaca contacted Mr. Steepleton. Initially, she called Mr. Steepleton and called him into her office. (Tr. 2930). "On the telephone call [Ms. Apodaca] just said that Moran cleaned out Dorfman's desk, 'come down to my office and talk to me'." (Tr. 2931). In Ms. Apodaca's office, she directed Mr. Steepleton to go to Dorfman's desk and look at it to confirm that it was, in fact, cleaned out. (Tr. 2933). Mr. Steepleton described the conversation in Ms. Apodaca's office:

Q: Okay. What did she say to you in her office?

A: She told me, I said, "What are you talking about?" She said that she had talked to Blake and that Blake told her that on Blake's behalf that Dennis Moran had cleaned out Blake's desk.

Q: Did you say anything to Ms. Apodaca?

A: "You've got to be kidding." I might have said something a little crustier than that, but –

Q: Did Miss Apodaca say anything else to you that you remember?

A: "I can't believe it. Go up and check out the desk."

(Tr. 2933-34).

d) The *News-Press* Verifies Dorfman's Claim that His Desk Is Cleaned Out

Mr. Steepleton examined Moran's desk and confirmed that it was cleaned out. Prior to Dorfman having gone to China, Mr. Steepleton examined Dorfman's desk. He remembered:

> There were some notepads, there were some team rosters, sports team rosters, there was a pennant; he was at a corner cubicle with a soft wall on one side, and there was a pennant there. There were notepads, kind of the tools of a report's trade.

(Tr. 2931). Mr. Steepleton had inspected Dorfman's desk just prior to Dorfman leaving for China due to the rumor of Dorfman leaving. (*Id*). Upon hearing learning of Dorfman's resignation from Ms. Apodaca, Mr. Steepleton again looked at Dorfman's desk. Mr. Steepleton described what he saw:

> Those things, some of those things that I had described were gone. There were no notepads on top, there were no team rosters on top, I opened the drawers to see that there were no notepads, things like that, in the drawers. It appeared to have been cleaned out from my previous having seen his desk.

(Tr. 2932).

e) Proprietary Information Is Missing from Dorfman's Desk

Mr. Steepleton explained that when a reporter separated from the *News-Press*, there was a general practice regarding notebooks:

> Management collects them and then if we have somebody who will be covering whatever area that person has left was covering, we might turn those notebooks, the Rolodex's whatever it is, over to that person that is going to take on that, those tasks.
>
> Q: What's in those notebooks, from your experience?
>
> A: Story notes. Story ideas. Telephone numbers of sources, names of sources. Maybe planning notes for stories down the road, I mean all sorts of information that reporter needs to write stories for us.

(Tr. 2934-35). Mr. Steepleton remembered clearing out the desks of at least three former employees, Dawn Hobbs, Rob Kuznia, and Melissa Evans. (Tr. 2935). A sports reporter, in particular, would also have a sports calendar, rosters, league information, schedules, and press guides. (Tr. 2935-36). Mr. Steepleton further explained that when the desk of a reporter was cleaned out, aside from personal effects, the *News-Press* "might give some of it over to the next person that would cover that beat or whatever it might be, or that area. We might just put it in – I have a locked office, we might lock it up in my office because we may need to refer to

something for legal purposes. So it kind of depends on what it is." (Tr. 2937). These facts were unrebutted.

Based on Dorfman's statement to Ms. Apodaca, and Mr. Steepleton's subsequent examination of Dorfman's desk, the *News-Press* concluded that Moran cleaned out Dorfman's desk. (Tr. 2937-38). At that time, the *News-Press* had no reason to disbelieve Dorfman's report to Ms. Apodaca. (Tr. 2937, 3340). Similarly, Mr. Steepleton had no reason to disbelieve Ms. Apodaca's statements to him about Moran cleaning out Dorfman's desk. (Tr. 2938). Based on Dorfman's report to Ms. Apodaca and the examination of Dorfman's desk, the *News-Press* decided to discharge Moran. (Tr. 2938).

Only at the hearing, on June 1, 2009 – nearly ten months after Moran's discharge – did the *News-Press* learn that Dorfman lied to Ms. Apodaca. (Tr. 918). Both Mr. Steepleton and Ms. Apodaca testified that had the *News-Press* known that Dorfman lied about Moran cleaning out Dorfman's desk, Moran would still be employed at the *News-Press*. (Tr. 2937, 3341).

f) The *News-Press* Terminates Dennis Moran

On August 30, 2008, via letter, the *News-Press* terminated Moran:

> Dear Dennis:
>
> As you know, we expect the employees at the *News-Press* to be honest and loyal while performing their duties here at the *News-Press*. We also expect every employee to carry out the functions of his or her job.
>
> On numerous occasions, management has informed all employees that decisions of content related to the newspaper that the *News-Press* produces is the sole prerogative of management, not the employees. This includes whether sporting events are covered, who covers them, and to what extent they are covered. Per company policy, you know that these decisions are also confidential, including personnel information like whether an employee has left the *News-Press* or the amount of staff the *News-Press* has to cover any event.
>
> As a result of your recent actions, the 48th annual Santa Barbara Golf Classic (held the first weekend in August 2008) was not covered as it has been in the past. The *News-Press* has routinely covered this event over the years. On several

occasions you were offered an opportunity to explain your actions and communications regarding this event and we have discovered that your explanation that this tournament simply "fell through the cracks" is not true. In fact, we have learned that you were dishonest in several respects, including:

- Speaking with Richard Chavez (the golf prop for the Santa Barbara Golf Club) about coverage for the Santa Barbara Classic. We know that you personally spoke with Richard Chavez about having sports coverage for this event.

- You also discussed confidential *News-Press* personnel information with Mr. Chavez, including that Kevin Merfeld no longer was employed at the *News-Press* and as a result that the *News-Press* did not have the staff to cover this tournament, and that the *News-Press* could not cover the tournament.

- We also know that you told Mr. Chavez that if he faxed the results of the tournament into the paper, you would include them in the sports pages. Despite Mr. Chavez faxing the results to you, you did not follow-up with Mr. Chavez, nor did you make sure that the scores were brought to my attention to be included in the paper.

Aside from our having zero tolerance for this dishonesty, you also discussed confidential personnel information for Mr. Merfeld and represented to a member of the public that the *News-Press* did not have appropriate staffing levels to cover this golf tournament as we had in the past. You have never been vested with authority to represent to any member of the public that the *News-Press* is unable to cover any event because of staffing levels. This is untrue and disloyal.

We have recently learned that you also violated company policy by secretly taking proprietary business information belonging to the *News-Press*. This information was inside the desk of recently resigned employee, Blake Dorfman. You have never been given authority by anyone in management to assist Mr. Dorfman in the removal of proprietary information or any material from Mr. Dorfman's prior desk belonging to the *News-Press*. You know that Mr. Dorfman is planning on setting up a competing business in reporting local sports. Your removal of this material in secret and failing to even ask Human Resources or any member of management of this activity speaks more to your dishonesty.

In addition to the dishonesty, disloyalty, and release of confidential information, you also failed to perform your duties adequately. This includes: failing to advise me of your conversation with Mr. Chavez; failing to allow me or other management to make the decision on how the *News-Press* would cover the Santa Barbara Classic; failing to follow-up with Mr. Chavez after your conversation with him to ensure we got timely scores; and failing to inform me that Mr. Chavez had faxed the scores to you so that they could be timely included in the paper. Please note that we continue to review whether your failure to perform your duties had occurred on prior occasions.

> Apart from failing to adequately perform your duties, we cannot look the other way regarding your dishonesty, disloyalty, and disclosure of confidential information. As a result, we are compelled to terminate your at-will employment agreement, executed and accepted by you on September 16, 2005.

(G.C. 147).

g) The *News-Press* Handbook and Policies

Moran received a copy of the *News-Press* Employee Handbook; he signed an acknowledgement form memorializing his receipt. (RESP. 1082).

The *News-Press* maintained a confidentiality policy as part of its employee handbook. This confidentiality policy required that all employees keep private the information concerning, among other things, the business operations at the *News-Press*:

> ***Employees have access to confidential information about the News-Press business***, advertisers and news stories before their publication. ***It is essential that the confidentiality of these matters be maintained and protected at all times***.
>
> For this reason, pre-printed or advance sections of the newspaper may not be taken out of the building in any manner or in any form, including without limitation digital copies. ***Any confidential information acquired as the result of employment with the News-Press may not be used for personal advantage or profit, nor be divulged for the advantage or profit of anyone else.***

(G.C. 125 at 43)(emphasis added).

In addition, the addendum to the business conduct policy (created by former Editor Jerry Roberts) expanded on this rule:

> ***This includes the unauthorized disclosure, release, sharing or leaking of any proprietary, personnel or other information involving the News-Press*** to any other news organization or media outlet.
>
> ***Such disclosures are strictly prohibited and will be subject to disciplinary action, up to and including immediate termination.***

(*Id*)(emphasis added).

Significantly, the *News-Press* informed all employees:

> All *News-Press* property, ***including but not limited*** to keys, ID and credit cards, must be returned no later than the last day of work.

(G.C. 125 at 36)(Emphasis added). When the employment relationship between the *News-Press* and the employee ended, the employee was required to turn over ***all*** *News-Press* property.

3. BARGAINING OVER MORAN'S DISCHARGE

After the *News-Press* decided to discipline Moran, the Teamsters requested bargaining over the discipline and requested that the *News-Press* rescind the discipline. The *News-Press* declined to rescind the discipline imposed and likewise refused to engage in any bargaining over the decision.

GCC/IBT initially claimed that the *News-Press* violated the Act by "failing to notify the Union prior to suspending employee Dennis Moran …" (G.C. 1(zzzz) at Exhibit H). The Region approved the withdrawal of that allegation on October 28, 2008. (*Id*). Inexplicably, however, the Region advanced the claim that the *News-Press* should have notified GCC/IBT before discharging Moran. (*Id*).[16]

B. ARGUMENT

The overarching theme of Moran's discipline was deceit. Blake Dorfman deceived the *News-Press* and lied about Moran cleaning out his desk. Dorfman, Moran, GCC/IBT, and the General Counsel all knew of this deceit. Dorfman admitted that he lied to the *News-Press* when he informed Ms. Apodaca that Moran cleaned out his desk. (Tr. 918). Moran admitted that he knew that Dorfman lied to the *News-Press* and that the *News-Press* relied on Dorfman's lie, yet did nothing. (Tr. 918). Moran also testified that he informed GCC/IBT of the lie upon which the *News-Press* relied to discharge him, and GCC/IBT did nothing. Finally, the General Counsel knew, 18 days after Moran's discharge, that Dorfman lied to the *News-Press* and the *News-Press*

[16] This was yet another example of the Region's bias against the *News-Press*.

had relied on Dorfman's lie to discharge Moran. The only party that had no knowledge of Dorfman's lie was the *News-Press*.

It was unrebutted that Dorfman lied to the *News-Press* and the *News-Press* relied on Dorfman's lie. The ALJ did not even attempt to explain how and why Dorfman lied to the *News-Press* about Moran cleaning out Dorfman's desk. Instead, the ALJ reframed the issue into one where the *News-Press* should not have believed Dorfman because of a rumor. The ALJ inexplicably concluded that the *News-Press* "knew (Dorfman) had lied to them only days before in asserting that he did not intend to resign his employment …" (ALJD 119:29-30; 119:46-49). There was no record evidence to support this finding. The ALJ endorsed the *News-Press* relying on a ***rumor*** that Dorfman intended to leave the *News-Press* that Dorfman, himself, dispelled through an impassioned denial. (Tr. at 996-97, 2922; RESP. 835). The ALJ concluded that the *News-Press* should have disbelieved an affirmative denial, relied upon a rumor, and disbelieved Dorfman's assertion that Moran cleaned out his (Dorfman's) desk that a visual inspection confirmed had been cleaned out. (Tr. at 2931-32). The *News-Press* was duped. The *News-Press* relied on objective evidence to conclude that Moran cleaned out Dorfman's desk. Relying on rumor is no way to manage a workplace.

The *News-Press* had no reason to believe that Dorfman would lie about Moran cleaning out his desk. What possible motive would Dorfman have to lie and implicate Moran? The ALJ's Decision fails to address this point, presumably because there was no rational reason for Dorfman to lie and implicate Moran. Moran and Dorfman were friends. (Tr. 1008). Mr. Steepleton explained:

> They (Dorfman and Moran) were buddies. I had no reason to believe that a buddy would throw another buddy under the bus, essentially. I had no reason to think that.

(Tr. at 3035). The ALJ failed to explain why a "buddy would throw another buddy under the bus." Instead, the ALJ attacked the *News-Press*, rather than the objective facts developed at the hearing and corroborated by every witness. Dorfman admitted he lied; Moran admitted he knew Dorfman lied and that GCC/IBT knew Dorfman lied; Dorfman's affidavit confirmed that the General Counsel knew on September 18, 2008, that Dorfman had lied to the *News-Press*. A mistaken, good faith belief is not a violation of the Act. (Tr. 1015, 1018).

How sinister a position to presume that employees regularly lie when asked questions by management. It is reasonable to believe that when asked a question, employees – like Dorfman – tell the truth. Even more so, in the instant case, Dorfman ***volunteered Moran's name rather than provided Moran's name in response to a question***.

1. THE DISCIPLINE OF MORAN WAS A LAWFUL EXERCISE OF MANAGEMENT AUTHORITY.

In the instant case, the ALJ rewarded dishonesty. With respect to Moran's suspension, the ALJ failed to acknowledge one unrebutted fact: Dennis Bateman unequivocally testified that he had never talked to Richard Chavez (Tr. at 1920-21). In contrast, Dennis Moran testified that he knew Mr. Chavez, and had talked with him about golf (Tr. 1473, 1527, 1539). According to the ALJ, Chavez' adamant denial that he disclosed Dennis Moran's last name was evidence enough to prove that the *News-Press* did not know which Dennis had talked to Chavez, but the same adamant denial by Dennis Bateman that he had ever talked to Chavez was not similarly convincing. This inconsistency was an uneven application of the Act reflecting arbitrary and capricious action. Chavez spoke to a "Dennis." Dennis Bateman denied ever speaking to Chavez; Dennis Moran did not. The "logical force" of this evidence reflects that Dennis Moran spoke to Chavez and failed to report a 2008 Santa Barbara Golf Classic.

a) The *News-Press* has the Right to Discipline Employees for Misconduct.

Employers may lawfully take appropriate action, including discipline and discharge, to address employee misconduct. *Moody Chip Corp*., 243 NLRB 265, 273 (1979) [discharge lawful because employee refused to work]; *Arduini Mfg. Corp*., 153 NLRB 887, 903 (1965) ["[U]nion activity neither confers immunity from discipline by the employer nor guarantees the union member immunity from discharge for cause."].

Section 10(c) of the Act precludes make-whole remedies for employees who are suspended or discharged for cause:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Moody Chip Corp. and *Arduini Mfg Corp*, in conjunction with Section 10(c) of the Act afforded the *News-Press* the ability to impose discipline upon Moran. "Union activism [] is not an impenetrable shield against discharge, and the Act itself 'does not give union adherents job tenure;" *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 716 (7th Cir. 1992). A company "can fire [an employee] for good, bad or no reasons, so long as its purpose is not to interfere with union activity." *NLRB v. Loy Food Stores, Inc*., 697 F.2d 798, 801 (7th Cir. 1983).

The record did not support a finding that Moran was suspended, and ultimately discharged, ***because of*** union activities. The fact that Moran was a bargaining unit committee member was not related to his suspension or discharge. There was no nexus between any union activities and Moran's discharge.

The ALJ recognized the lack of a causal nexus and created an artificial construct to support the notion that the *News-Press* suspended Moran because of union activities. (ALJD 117:44-48). The ALJ ignored the fact that Dennis Bateman denied ever speaking to Chavez (Tr.

2906) and that Dennis Moran did not deny ever speaking to Chavez (Tr. 1546-47). As explained above, it makes no sense that the ALJ credited Chavez' denial of stating "Dennis'" last name, but did not credit that "Dennis" informed Chavez that the *News-Press* was understaffed, unable to cover the Santa Barbara Golf Classic, and that Chavez should fax in the scores. (Tr. 2902-03). And Dennis Bateman denied ever speaking to or ever knowing the name Richard Chavez. (Tr. 2906). Instead of this record evidence, the ALJ ***speculated, with no record evidence to support his theory*** that the *News-Press* conspired, at the highest level, to discipline Moran. (ALJD 117: 15-48). The ALJ acknowledged that his conclusion was based on an inference, not fact. (ALJD 117:15-16). The ALJ created a conclusion from whole cloth. Rather than relying on the evidence in the record, namely that Dennis Bateman denied ever speaking to Chavez while Dennis Moran did not, the ALJ created facts to support the notion that the *News-Press* discriminated against Moran.

The ALJ went so far as to stretch an email to suit his construct noting that Dennis Moran's name was not listed among a number of employees who were named as unlikely to walk out of the paper. (ALJD 117:22-29). The ALJ assumed that the issue in the email was protected activity; there is no evidence in the record to support the notion that employees would walk out of the workplace due to protected activities.[17] If this evidence were so critical to the ALJ's conclusion, it stands to reason that the ALJ would have asked questions to develop these facts. The record, however, contains no questions by the ALJ on this matter.

Recognizing that he stretched facts to create an artificial construct, the ALJ denied that his conclusion was a "far leap," recognizing that an objective viewer would see through the sham. (ALJD 117:31-32). The ALJ's conclusion that the *News-Press* associated Moran with the lack of coverage of the Santa Barbara Golf Classic was due to animus was little more than

[17] In fact the only walk out in the history of the *News-Press* was related to unprotected activity, namely the editorial content of the newspaper. (Tr. 1772).

speculation and innuendo. The ALJ's conclusion that his theory was "based on [Moran]'s union activities is sustained primarily by the lack of record alternatives," does not pass record muster. By virtue of inferring facts based on no record evidence, the ALJ acknowledged that the General Counsel did not make out a prima facie case that Moran's union activities had a causal nexus with his suspension. This dramatic flaw in the ALJ's reasoning compels the dismissal of this allegation.

b) Moran Violated Written Policy With an Unauthorized Pronouncement that the *News-Press* could not Cover the Santa Barbara Golf Classic.

The ALJ credited Chavez' testimony explaining that Chavez was "consistent and believable without being defiant or stubborn … (and) Chavez was both telling the truth as he saw and that the way he saw it was based on a strong memory of the aspects of the events." (ALJD 112:23-26). That being the case, it is undisputed that Chavez spoke to a "Dennis." It is further undisputed that the Dennis to whom Chavez spoke told Chavez that the *News-Press* could not cover the Santa Barbara Golf Classic. (Tr. 2902-03). In addition, the Dennis with whom Chavez spoke stated that the *News-Press* was understaffed and that Dennis told Chavez to fax in the scores and the *News-Press* would "try" to run the scores in the paper. (*Id*). Given these facts, established through Chavez, "Dennis" violated written *News-Press* policy.

In evaluating which Dennis to whom Chavez spoke, it is necessary to remember that Dennis Bateman unequivocally denied ever speaking to Chavez and stated that he did not know who was Mr. Chavez. (Tr. 2906). In contrast, Dennis Moran did not deny knowing Chavez and knew that Chavez was affiliated with golf. (Tr. 1471). Based on the testimony of Chavez, the unequivocal denial of Bateman, and the non-denial of the implicated employee – Moran – the record demonstrated that Chavez spoke with Dennis Moran. The ALJ's failure to continue his analysis based on his credibility resolutions pertaining to Moran was arbitrary action inconsistent

with an even application of the Act. Chavez spoke with Dennis; there were two Dennises, Bateman and Moran, and only Bateman unequivocally denied ever speaking with Chavez. The record established, then, that Chavez spoke to Moran.[18] The ALJ's conclusion was unsound and incomplete. A thorough analysis of the record – as credited by the ALJ – leads to the very reasonable conclusion that Chavez spoke with Dennis Moran and Dennis Moran violated *News-Press* policy in his conversation with Chavez.

c) Unprecedented Misconduct Is Subject to Discipline

The Board acknowledged in *Elko Gen. Hosp.* that discipline is left to the discretion of the employer. The Board explained:

> We recognize that Respondent has not shown a practice of disciplining similar misconduct. However, the circumstances confronting Respondent – an employee facing down management with defiant and disloyal speech at a pre-election meeting – were unprecedented. ***To say that an employer must show a prior instance of similar misconduct would preclude an employer disciplining an unprecedented wrong, irrespective of how egregious that wrong might be. We reject that approach***.

Elko Gen. Hosp., 347 NLRB 1425, 1428 (2006) (emphasis added).

It is preposterous to think that *News-Press*, or any employer, must draft exhaustive lists detailing every possible type of misconduct or workplace infraction that could take place as exclusive grounds for discipline. Workplaces are dynamic; the issues an employer may face cannot easily be predicted. The Board has stated that an employer's right to take corrective action should not be hindered simply because it had not happened before. *See also Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) ("While it may be that no employee had previously engaged

[18] It is important to recognize that this conclusion is not based on the testimony of Scott Steepleton, whom the ALJ discredited. The *News-Press* disagrees that Mr. Steepleton was not a credible witness and excepted to this conclusion; however, it is important to notice that the conclusion expressed above, does not rely on evidence from Mr. Steepleton.

in precisely the same type of misconduct as [the employee] did, the Respondent was not thereby precluded from validly disciplining [the employee] for such misconduct.").

The General Counsel failed to offer any other instances of misconduct remotely similar to that of Moran of which the *News-Press* had knowledge. Moran was contacted about a story but told no one, said the *News-Press* could not cover the story, ignored the lead, admitted speaking to the source, and then denied speaking to the source only days later. While unprecedented, this cannot and should not curtail *News-Press's* right to impose warranted discipline based upon the facts after a thorough investigation.

In fact, at least one court has held that companies need not have set procedures for what action it will take in adjudicating every single employment problem. *See 6 West Limited Corp. v. NLRB*, 237 F.3d 767, 778 (7th Cir. 2001). Rebuking the Board, the Seventh Circuit found that the Board's reliance on the absence of any formal policy was "not only misplaced legally, but divorced from the real world, and an example of skewed and position-oriented decision making without the application of logical reasoning and common sense." (*Id*). The Seventh Circuit categorically rejected the Board's theory that the failure to have an express written policy stating that the employer would discharge employees who failed to give credible answers during investigation meant that the company would not have fired the employee absent union activity. (*Id)*. The Seventh Circuit's reasoning is equally applicable to the instant charge regarding Moran's discipline and subsequent termination.

Moran engaged in a number of deceitful acts while working for the *News-Press*.[19] As the *6 West Limited* Court opined, "it is obvious that companies must be able to discharge a thief or an untruthful employee." 237 F.3d at 778. Moran was just such an employee. Relying on an EEOC case, the *6 West Limited* court noted:

[19] Moran's deceit continued in spectacular fashion following his termination, as well.

> [F]alse statements impair the employer's ability to make sound judgments that may be important to the employer's legal, ethical and economic well-being. So, an employer is entitled to expect and to require truthfulness and accuracy from its employees in an internal investigation that is exploring possibly improper conduct in the business's own workplace … Therefore, an employer, in these situations, is entitled to rely on its good faith belief about falsity, concealment, and so forth.

(*Id*). (quoting *EEOC v Total System Services, Inc*., 221 F.3d 1171, 1176 (11th Cir. 2000)).

The *News-Press* was entitled to expect and require that Moran be honest and truthful. Simply put, Moran was neither. Moran's dishonesty raised a number of concerns, including dealing with management, coworkers, customers (Chavez) and properly performing his reporting duties. The *News-Press* acted appropriately, considering the gravity of Moran's actions.

Discipline is distinctly within the purview of management. "The question of proper discipline of an employee is a matter left to the discretion of the employer … if discrimination may be inferred from mere participation in union … activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership." *NLRB v. Consolidated Diesel Elec. Co.*, 469 F.2d 1016, 1025 (4th Cir. 1972) (internal citations omitted); *see also McClatchy Newspapers, Inc.*, 337 NLRB 1161, 1162 (2002) (NLRB should not substitute its judgment of what constitutes appropriate discipline for that of management). Moran's suspension and discharge were reasonably explained; these allegations should be dismissed.

2. THE *NEWS-PRESS* DISCIPLINED MORAN FOR A LEGITIMATE, NON-DISCRIMINATORY REASON – MORAN WAS DISHONEST AND ENGAGED IN MISCONDUCT.

In *Wright Line*, 251 NLRB 1083, 1087 (1) 980), enf'd 662 F. 2d 899 (1st Cir. 1981), cert. denied. 453 U.S. 989 (1982, *approved by NLRB v. Transportation Mgmt. Corp.*, 462 U.S 393, 401, 103 S. Ct. 2469, 76 L. Ed. 2d. 667 (1983), overruled in other respects by *Director, Office of Worker's Compensation Programs v. Greenwhich Collieries*, 512 U.S. 267, 278, 114 S. Ct.

2251, 129 L. Ed. 2d. 221 (1994), the Board held that in order to establish a *prima facie* violation of Section 8(a)(3) and (1) of the Act, the General Counsel had to establish that:

1. The alleged discriminate engaged in union activities;
2. The employer had knowledge of the discriminatee's union activities;
3. The employer's actions were motivated by union animus; and
4. The discharge had the effect of encouraging or discouraging membership in a labor organization.

In addition, *Wright Line* stated that the General Counsel had the burden of proving the above elements by a preponderance of the evidence. The ALJ erred by concluding that the General Counsel satisfied this burden.

a) Moran was not Engaged in Union Activities when He Spoke to Mr. Chavez, When He Failed to Bring the Santa Barbara Golf Classic Story to the Attention of Management, When He Unilaterally Decided that the *News-Press* Was Understaffed and Could Not Cover the Tournament, and When He Failed to Bring to Anyone's Attention that Mr. Chavez Would Fax in the Scores.

Moran was not engaged in union activities when he spoke to Mr. Chavez, when he failed to bring the Santa Barbara Golf Classic Story to the attention of management, when he unilaterally decided that the *News-Press* was understaffed and could not cover the tournament, and when he failed to bring to anyone's attention that Mr. Chavez would fax in the scores.

The *News-Press* suspended, then terminated Moran because of his overall conduct, not because of any union activity. There was only cursory testimony that Moran attended bargaining sessions, and that the *News-Press*, in a January 11, 2008 letter, directed employees to him as a "union representative." (Tr. 1465-66; G.C. 146). The *News-Press* admits that Moran attended negotiations and directed employees to him as a "union representative;" however, this admission

does not permit a quantum leap to the conclusion that the *News-Press* discriminated against Moran because he engaged in union activities. As explained, supra, there was no causal nexus, instead the ALJ relied on inference and innuendo to link Moran's suspension and discharge to union activity.

As explained in *American Inc.*, 342 NLRB 768, 768 (2004), mere "suspicious [circumstances] are insufficient to warrant an inference that the Respondent was motivated by anti-union animus." *Id.* (citing *Dorsey Electric Co.*, 312 NLRB 150, 151 (1993)(Explaining that "proof of suspicious circumstances is not enough" to demonstrate actual animus.)). Here, the ALJ relied on "suspicious circumstances," to find animus, rather than record evidence.

Similarly, an unlawful purpose to a company's actions should not be lightly inferred. *See NLRB v. Fed. Pac. Elec. Co.*, 441 F.2d 765 (5th Cir. 1971); *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245 (5th Cir. 1978). Suspicion, conjecture, and theoretical speculation register no weight on the substantial evidence scale. *See Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 742 (5th Cir. 1979); *NLRB v. O.A. Fuller Supermarkets Inc.*, 374 F.2d 197 (5th Cir. 1967)(Cited with approval in *TRW, Inc. v. NLRB*, 645 F.2d 307, 312 (5th Cir. 1981)). Here, the ALJ erred by concluding that the General Counsel proved the first prong of the *Wright Line* test.

b) Moran's Union Affiliation Does Not Protect Him from Discipline for Misconduct.

Moran's union affiliation did not protect him from discipline for misconduct. There is no precedent to support the notion that an employer must endure a violation of its rules so long as an employee wraps himself or herself in a shroud of union activity. Mere union affiliation does not insulate an individual from legitimate workplace expectations. *See, e.g., Fl. Steel Corp. v. NLRB*, 601 F.2d 125, 131-132 (4th Cir. 1979).

Employers are not required by the Act to tolerate workplace misconduct of employees who engage in union activities. *See* 29 U.S.C. § 160(c). Simply engaging in union (or protected) activities does not protect an employee from discipline for workplace misconduct. *See Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 667, 689 (7th Cir. 2000) (Employer not forced to continue tolerating bad behavior, let alone increasingly bad behavior.); *see also NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207, 1214 (7th Cir. 1981) (An employer must be able to free itself of continuing unproductive, internal, and improper conduct.); *see also Washington Materials, Inc. v. NLRB*, 803 F.2d 1333 (4th Cir. 1986) (same). In the instant case, there were no union activities in which Moran engaged when he spoke to Mr. Chavez, when he failed to bring the Santa Barbara Golf Classic story to management's attention, when he unilaterally decided that the *News-Press* was understaffed and could not cover the tournament, and when he failed to bring to anyone's attention that Mr. Chavez would fax in the tournament scores. This allegation should be dismissed.

The *News-Press* suspended and ultimately discharged Moran because of his failure to be forthright with his supervisor and management during the investigation involving the Santa Barbara Golf Classic; the violation of *News-Press* policies that were implicated by his communication with Mr. Chavez; Moran's subsequent failure to bring the story to his supervisor; his dishonesty during the investigation; and the violation of *News-Press* policy involving the removal of *News-Press* property. The corrective action taken by the *News-Press* was not because of union membership or attendance at collective bargaining sessions. Employers must, and routinely do, take action notwithstanding union activity or affiliation; this was one such case.

The Board does not condone dishonesty. *See Alamo Rent-a-Car*, 336 NLRB 1155, 1156 (2001). In fact, former-Chairman Battista once wrote in dissent that, even assuming *arguendo* that an investigation is discriminatorily motivated, it "does not give license to an employee to lie

to his employer … nor does it mean that the lie is immune from discipline." *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 7 (2003). Battista believed that a lie told during an investigation ***does constitute cause*** for discharge under Section 10(c) of the Act. *Id*. While *News-Press's* investigation was not discriminatorily motivated, Moran's dishonesty still subjected him to discipline.

Prior Board cases agree with the maxim on dishonesty in the workplace. The Board reversed an ALJ's finding that an employer violated 8(a)(3) and (1) of the Act by discharging an employee who had been less than honest with his employer in *The Children Mercy's Hosp*., 311 NLRB 204, 206 (1993). The employee in question falsified records involving equipment inspections; when confronted by management, he gave conflicting answers. *Id* at 204-05. First, he said that he completed all of his inspection. *Id* at 205. In a subsequent meeting, he told another supervisor that he turned the work order in as "unfinished" (even though the records indicated otherwise); when asked during the investigation why he was providing different answers, the employee simply shrugged. *Id*. The employee was discharged for falsification of records and misrepresentation of facts. *Id*. The Board found that the employee had knowingly falsified his work orders and misrepresented the truth during the investigative process. *Id*. The Board agreed with the employer's assessment that the worker was no longer trustworthy. *Id*. In light of this, the Board found that the employer relied on these factors in deciding to discharge the employee, and that the employee's conduct warranted bypassing steps in the disciplinary system. *Id*. Therefore, the Board reversed the ALJ and dismissed the 8(a)(3) and (1) allegations. *Id*.

The facts in *The Children Mercy's Hosp*. were analogous to the instant allegation, and the Board's rationale is equally applicable to this allegation:

- Moran gave conflicting answers and brushed off the entire situation as a story that "fell through the cracks;"

- He shifted blame when he could; and
- He demonstrated that he could not be trusted, particularly in light of the *News-Press*'s good faith belief that Moran assisted Dorfman in removing *News-Press* property without permission.

Like the employee in *The Children Mercy's Hosp.*, Moran was discharged, in part, for misrepresenting what happened – he was dishonest. Moran had initially admitted to speaking with Chavez and then denied everything. This was what *News-Press* relied upon in deciding to suspend Moran.

In *Fresno Bee*, 337 NLRB 1161 (2002), the Board dismissed a complaint in its entirety based on the General Counsel's failure to show that the discharge was unlawful. *See Fresno Bee* at 1162. The evidence in *Fresno Bee* showed that the discharged employee would have been discharged even if he had not been associated with a union. *Id*. The Board further held that while the action might appear severe, the Board will not substitute its judgment for that of an employer as to what is appropriate when it has been shown that the employer would have taken the action regardless of any protected activity. *Id*. Moran was dishonest, and his actions in failing to alert Steepleton of Mr. Chavez's call and failure to cover the Santa Barbara Golf Classic damaged the paper.

In *Snap-On Tools*, *supra*, the Board upheld a "final warning" discipline issued to an employee for making unfounded allegations and false statements. Because the discipline was not motivated by antiunion animus and would have been made notwithstanding union affiliation, there was no violation of the Act. *See* 342 NLRB at 9. Moran's union activity was irrelevant to the decision to discharge him. There was no evidence to suggest otherwise. His conduct alone was sufficient grounds for his suspension. The *News-Press*'s good faith belief of Moran's actions in cleaning out Blake Dorfman's desk pushed the matter from suspension to discharge.

In *Lignotock Corp*., 298 NLRB 209 (1990), the Board adopted an ALJ's recommended decision dismissing a complaint. In *Lignotock*, the employer discharged three employees; the company defended against 8(a)(1) and 8(a)(3) allegations. In reviewing the record evidence, the ALJ noted that the discharges "were not made precipitously, but were made only after investigation and interviews and were based upon valid business reasons." *Id* at 211-12. Further, the company gave more than one opportunity for the employees to admit their error in leaving company property without authorization, yet the employees repeatedly lied about their conduct. *Id* at 212. Not only did the ALJ find that the General Counsel failed to meet its initial burden under *Wright Line*, the company successfully showed that employees:

> … engaged in actions in violations of plant rules and standards of conduct, that it investigated the circumstances in a fair and non-discriminatory manner and imposed the penalty of disciplinary discharge only after the employees persisted in lying about their involvement with the incidents. Respondent is shown to have had valid business reasons not inconsistent with company rules and practices for discharging these three employees and it otherwise did not engage in acts inconsistent with the illegal motivation asserted by the General Counsel.

Id. Therefore, the ALJ recommended that the complaint be dismissed; the Board agreed. *Id* at 209, 212. Similarly, in *ABF Freight System, Inc*., 304 NLRB 585, 590 fn. 13 (1991),[20] the Board acknowledged that giving dishonest excuses can be grounds for discharge and other disciplinary actions.

[20] The Board has even upheld arbitration decisions involving dishonest remarks. In *United Parcel Service (UPS) of Ohio*, 305 NLRB 433 (1991), the Board deferred to the arbitrator's finding and dismissed the complaint. The relevant facts in *UPS* involve employees who were discharged for dishonesty and falsification of grievance documents. *Id* at 433. The arbitrator found that the employees had in fact made false statements and persisted in making those false statements until they realized they had been detected. *Id*. The Board found that the arbitrator properly considered the alleged unfair labor practices in the matter before the Board, and the findings were not repugnant to the Act. *Id* at 433, 434. In doing so, he determined that the employees were discharged for cause, and the Board dismissed the complaint as a result.

The *News-Press* discovered Moran's violation of company policy, conducted a fair and non-discriminatory investigation, and imposed discipline ***only after*** Moran lied during the investigation. The evidence was inconsistent with any allegation of illegal motivation.

The *News-Press* engaged in an investigation that involved speaking with Chavez as well as the employees implicated by Chavez's information. Mr. Steepleton spoke with Dennis Bateman and Dennis Moran. Mr. Chavez unequivocally spoke to "Dennis" (Tr. 1609), and admitted that it was possible that he was even named Dennis Moran. (Tr. 1621, 1630-31). Dennis Bateman denied ever speaking with or even knowing Chavez; Dennis Moran made no such unequivocal denial.

Moran failed to inform Steepleton about the story lead. He knew that Steepleton would want to know about the conversation with Chavez, especially since the *News-Press* ***always*** covered the event. (Tr. 2900; RESP. 833, 908). Moran also knew, or should have known, that Steepleton would decide how best to proceed in covering the story.[21] Again, the decision to ignore the story was not Moran's decision to make and violated *News-Press* policy and protocol. The policies were straightforward; Moran knew or should have known them, and more importantly, Moran was expected to comply with the written company policies. His union affiliation could not shield him from discipline for violating the same policies that applied to all employees.

When employees fail to follow company policies, discipline (up to an including discharge) has been upheld. In *ATC/Forsythe & Assoc., Inc*., 341 NLRB 501 (2004), an employee was involved in a vehicular accident, failed to report it, and was subsequently discharged when the employer found out. *Id* at 502. The evidence supported the employer's argument that the reason for the termination was violation of company policy, and that such

[21] GCC/IBT activist Ms. Hobbs knew this fact. (Tr. 1220-21).

treatment was consistent with how it handled other drivers who failed to report accidents. *Id*. Based on this evidence, the Board held that the discharge was lawful. *Id*. The same analysis applied to Moran's suspension.

In the same way, Moran failed to properly cooperate with the *News-Press*'s investigation by giving contradictory answers throughout the course of his two meetings with management. His inconsistent answers were part and parcel of his overall dishonesty and misconduct, and justified the *News-Press'* decision to discipline him.

In *Earle Indus., Inc. v. NLRB*, 75 F.3d 400, 404 (8th Cir. 1996), the court decided that dishonesty and insubordination could justify discharge under a *Wright Line* test. The employer argued that it was entitled to discharge an employee for dishonesty and insubordination in order to maintain discipline. *Id* at 404, 405. The court agreed, and denied enforcement of the Board's Order. *Id* at 407. The Board's findings, which reversed the ALJ, were unreasonable and arbitrary, amounting to an "imprimatur to industrial anarchy." *Id*. According to the Eighth Circuit, ***protecting manipulative dishonesty is not a goal of the Act***. *Id*. (Emphasis added).

Certainly, uncorrected misconduct and violation of company policy paves the way for industrial anarchy, as noted by the Eighth Circuit. The *News-Press'* decision to suspend Moran was a lawful exercise of management rights. The ALJ's Decision creates the very "industrial anarchy" the Act was designed to prevent. The allegations should be dismissed.

c) Moran also Engaged in Disloyal Conduct by Disparaging the *News-Press*'s Product.

Moran was disloyal when he disparaged the *News-Press* and told Mr. Chavez that the *News-Press* could not cover the Santa Barbara Golf Classic. This was not Moran's decision to make, it conveyed a lack of interest to Mr. Chavez, and it suggested that the *News-Press* was incapable of covering the tournament. "There is no more elemental charge for discharge than

disloyalty to his employer" as the Supreme Court noted in *NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953), regarding application of 10(c) of the Act. As a result, courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty. (*Id*) at 474. In *Jefferson Standard*, the comments in handbills constituted a disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income. (*Id*) at 471. Moran's comment was the same.

Per *Jefferson Standard* communications that are so disloyal, reckless or maliciously untrue lose the Act's protection. *See Emarco, Inc*., 284 NLRB 832, 833 (1987). In fact, the Board has justified discipline in cases like *American Arbitration Assn.*, 233 NLRB 71 (1977), where an employer discharged an employee for sending a letter to clients disparaging the operation of his employer's business. Also, in *Firehouse Restaurant*, 220 NLRB 818 (1975), the Board dismissed allegations where the employee's attitude was flagrantly disloyal, wholly incommensurate with any grievances manifested itself by public disparagement of the employer's product, and undermined the company's reputation.

Moran's comments conveyed the idea to Mr. Chavez that the *News-Press* was unconcerned with the Santa Barbara Golf Classic. This was unacceptable and untrue, given that Moran was unauthorized to make content decisions, and the *News-Press* had always covered the tournament. (RESP. 833, 908; Tr. 2900). In essence, Moran told Mr. Chavez that the Santa Barbara Golf Classic was not important enough for the *News-Press* to cover. Moran made matters worse by failing to even report that the golf scores were going to be faxed in to the newspaper. Mr. Chavez testified that he was angry and "very upset" that the *News-Press* did not cover his tournament. (Tr. 1596-97).

In *Peerless Publications, Inc., (Pottstown Mercury)*, 283 NLRB 334 (1987), the Board issued an opinion upon remand from the D.C. Circuit. In the remanded opinion, the Board explained:

> We reaffirm the view that protection of the "editorial integrity of a newspaper lies at the core of publishing control," and that in order to preserve such, a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would "directly compromise their standing as responsible journalists and that the publication for which they work as a medium of integrity," without necessarily being required to bargain initially. It follows from this privilege – which is directly incident to a newspaper's integrity – that the newspaper will be similarly exempt from mandatory bargaining about disciplinary action for employee breach of the basic rule.

Peerless at 335. While *Peerless* addressed journalistic ethics, the same legal theory supported the *News-Press*'s policy regarding work assignments. The maintenance of an image demonstrating substantial interest in local news and events was central to the enterprise, and was why management determined story assignments.[22] The public wanted coverage of the Santa Barbara Golf Classic, and Moran's actions had a direct negative effect upon the *News-Press* and its standing in the community. (RESP. 833).

Moran's comments and failure to report to management Mr. Chavez's call about the Santa Barbara Golf Classic had a negative impact on the public's perception of the *News-Press*'s standing in the community. If the public considers the *News-Press* incapable of reporting the news, or worse, unconcerned with the local community and its issues, business will suffer. In fact, it can even give rise to customers canceling their subscriptions. At least one subscriber threatened just that! (RESP. 833).

[22] Indeed, co-Publisher Mr. Von Weisenberger told Mr. Steepleton, in reaction to the 2008 Santa Barbara Golf Classic fiasco, "In the bigger picture, we need to get the sports department geared up for effective local coverage in September." (RESP. 791).

3. THE *NEWS-PRESS* LEGITIMATELY DISCHARGED MORAN

The hearing revealed spectacular evidence – namely, that Blake Dorfman lied to Ms. Apodaca about Moran cleaning out his (Dorfman's) desk. (Tr. 978, 1008, 1017). In fact, during its questioning of Mr. Steepleton, GCC/IBT tacitly admitted that Dorfman lied to Ms. Apodaca. (Tr. 3032, 3034). Most shocking was the fact that neither Moran, GCC/IBT, nor the General Counsel ever notified the *News-Press* of Dorfman's lie to Ms. Apodaca (Tr. 2938-39, 3341).

a) The *News-Press* Had a Good Faith, Albeit Mistaken, Belief that Moran Cleaned Out Dorfman's Desk.

At best, the General Counsel demonstrated that the *News-Press* discharged Moran on a mistaken, good faith belief. A discharge based on a mistaken, good faith belief does not constitute a violation of the Act. The ALJ offered only cursory analysis of this principle. By discharging Moran on a mistaken, but good faith belief, the *News-Press* did not violate the Act.

In *Yuker Construction Co*., 335 NLRB 1072 (2001), the Board held that the discharge of an employee based on a mistaken belief did not constitute an unfair labor practice because the Act only prohibited an employer from discharging an employee for engaging in protected or union activities. In relevant part, the Board wrote:

> The judge found that, in discharging Newberry and Purgiel, Yuker "shot from the hip and acted hastily on a mistaken belief, but such conduct does not constitute an unfair labor practice. ***We agree***. See e.g., *Manimark Corp. v. NLRB*, 7F3d 547, 552 (6th Cir. 1993)(employer may discharge employee for any reason, whether or not it is just, as long as it is not for protected activity) citing *NLRB v. Ogle Protection Serve*., 375 F2d 497, 505 (6th Cir. 1967), cert. denied 389 U.S. 843 (1967).

Id at 1073. (emphasis added).

In *Scenic Hills Nursing Ctr*., 353 NLRB No. 102 (Feb. 27, 2009), the Board affirmed the ALJ's findings and dismissed a complaint that alleged violations of Sections 8(a)(1), (3), and (4) of the Act for the discharge of an employee. In *Scenic Hills Nursing*, the General Counsel

argued that the employer engaged in a patient abuse investigation to mask the true reason for the termination. Slip Op. at 7. The Board and ALJ rejected this theory because the General Counsel did not conclusively establish that the patient abuse investigation departed from past practice or that the decision to rely on corroborating evidence from neutral staff members and a witness account was pre-textual. *Id*. The ALJ cited *Yuker Construction Co*., *supra*, to support his findings. *Id* at 4, fn 7.

In *McKesson Drug Co*., 337 NLRB 935, 936, fn. 7 (2002) the Board relied on *Yuker Constr. Co*. to opine that in order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), [*an employer need not prove that the employee committed the alleged offense*;] however, the ***employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him***. This was the same idea expressed in *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) where the Board held that employer must establish, at a minimum, that it had reasonable belief of employee misconduct.

In *McKesson Drug Co.*, the Board also cited *Affiliated Foods*, 328 NLRB 1107, 1108 fn. 1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy*, 294 NLRB 1011, 1012-1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself)…. [Chairman Hurtgen's concurring comment omitted.]

Also, in *Jordan Marsh Stores Corp*., 317 NLRB 460, 476 (1995), the Board adopted ALJ Michael O. Miller's statement of the law: "To rebut that prima facie case and show that Ray would have been discharged for the same conduct even in the absence of her union activity, Respondent must only show that it reasonably believed that she had engaged in misconduct of a level warranting termination. *GHR Energy Corp*., 294 NLRB 1011, 1012-013 (1989), enfd. 924 F.2d 1055 (5th Cir. 1991)."

The Board also applied *Yuker Const*. in *ATC Forsythe & Associates, Inc*., 341 NLRB 501 (2004). There, the Board noted that although the investigation may have been less than ideal, there was no persuasive evidence that any shortcomings in the investigation were motivated by animus against the union. *Id* at 502. Likewise, although the conclusion that the discharged employee was involved in an accident may have been questionable (as the ALJ acknowledged), there was no persuasive evidence that the conclusion, or the reliance on it, was tainted. *Id*. ***That the conclusion may have been incorrect did not establish an unlawful motive, on this record***. *See Yuker Constr.*, 335 NLRB 1072, 1073 (2001).

The *News-Press* had a reasonable belief that Moran cleaned out Blake Dorfman's desk. The *News-Press* had no reason to disbelieve Dorfman. Ms. Apodaca testified that she had no reason to disbelieve Dorfman's statement that Moran had cleaned out Dorfman's desk. (Tr. 3340). Ms. Apodaca testified:

Q BY MR. KELLEY:	When Mr. Dorfman told you that Mr. Moran helped him clean out his desk, did you think he was lying?
JUDGE ANDERSON:	Did she think it then or now?
Q BY MR. KELLEY:	Yeah, did you think then when Mr. Dorfman told you that, that he was lying to you?
A:	No. I would not have any reason to believe he was lying.

(Tr. 3340). Ms. Apodaca further stated that if the *News-Press* had known that Dorfman lied about Moran cleaning out his desk, then Moran would still be employed at the *News-Press*. (Tr. 3341). And, despite counsel for GCC/IBT's attempts to question Ms. Apodaca's apparent failure to divine, through preternatural power, that Dorfman lied about Moran cleaning out Dorfman's desk, Ms. Apodaca candidly explained that she had no reason to disbelieve Dorfman's statement that Moran cleaned out Dorfman's desk. (Tr. 3405-07).

Mr. Steepleton also testified that he had no reason to disbelieve Dorfman's report to Ms. Apodaca that Moran cleaned out Dorfman's desk. (Tr. 2937-38). In fact, Mr. Steepleton examined Dorfman's desk, which supported Dorfman's statement to Ms. Apodaca that Moran cleaned out Dorfman's desk. (Tr. 2938). Again, counsel to GCC/IBT challenged Mr. Steepleton's belief, at the time, that Moran cleaned out Dorfman's desk:

> Q: But you still believe that you had no – you still testified that you had no reason to disbelieve what you had heard about Mr. Dorfman's statement?
>
> A: They (Dorfman and Moran) were buddies. I had no reason to believe that a buddy would throw another buddy under the bus, essentially. I had no reason to think that.

(Tr. 3035).[23]

Further, Dorfman had no apparent reason to lie. He was no longer an employee of the *News-Press* after his August 15, 2008, resignation letter. (RESP. 1602). Dorfman had no axe to

[23] Counsel to GCC/IBT's questions, in this regard, were more suggestive of the mindset of GCC/IBT, than reality. GCC/IBT, through these questions challenged the *News-Press* management's reasonable belief that employees actually tell the truth. This was more of a reflection on GCC/IBT than the *News-Press*. Counsel to GCC/IBT apparently expected the *News-Press* to approach questions and answers with employees from the perspective that the employees are attempting to deceive the *News-Press*. The only evidence of a party attempting to perpetrate a fraud against the *News-Press* were the actions of GCC/IBT, Moran, and the General Counsel in knowingly and deliberately withholding from the *News-Press* the fact that Dorfman lied to Ms. Apodaca. This damning fact pervaded all aspects of GCC/IBT's charges, as well as General Counsel prosecution of this case.

grind against Moran. There was no legitimate reason to suspect that Dorfman lied about Moran cleaning out his (Dorfman's) desk.

b) In Response to Kafka

The ALJ's colorful reference to a "Kafkaesque" paradigm (ALJD 119:51-120:12) was little more that sensationalism to disguise the underlying point: Dorfman lied and the *News-Press* reasonably relied on Dorfman's lie implicating Moran.

The ALJ attempted to buttress his own conclusion by changing the facts to conclude that the *News-Press* "knew (Dorfman) had lied to them only days before in asserting that he did not intend to resign his employment …" (ALJD 199:29-31). Conspicuously omitted from this conclusion is any record evidence to support such a bald assertion. To be clear, not until June 1, 2009, at the hearing, did the *News-Press* learn that Dorfman lied to the *News-Press* about Moran cleaning out Dorfman's desk.

Significantly, the ALJ did not disagree that cleaning out Dorfman's desk, if true, was a terminable offense. This was because the ALJ recognized the serious breach of protocol and removal of proprietary information warranted discharge.

Rather than assess the facts as they were at the time, the ALJ analyzed the situation in hindsight complete with the scandalous information known by Dorfman, Moran, GCC/IBT, and the General Counsel and unknown by the *News-Press*. The ALJ accused the *News-Press* of not properly interviewing Moran about the desk clearing. (Tr. 112:1-5). The ALJ attempted to downplay Dorfman's report that Moran cleaned out Dorfman's desk by referring to it as a "casual reference," and called into question Dorfman's veracity by concluding that the *News-Press* "well knew (Dorfman) had recently lied to it regarding his intentions to continue his employment …" (ALJD 120:1-3).

The ALJ's conclusion that the *News-Press* "knew" that Dorfman lied about Moran was incredible, particularly given the ALJ's conclusion that if the *News-Press* had asked Moran about the desk clearing incident "I am satisfied that Dorfman's glib falsehoods would have been quickly discerned if not immediately corrected by Dorfman himself or Moran." (ALJD 120:22-23). Assuming the ALJ's supposition was correct, it begs the question of why Moran, Dorfman, GCC/IBT, or the General Counsel did not correct Dorfman's falsehood with the *News-Press* at a time before the hearing? A reasonable person would, presumably, make all reasonable efforts to absolve an innocent. By virtue of GCC/IBT (and the General Counsel) doing nothing in response to the *News-Press*'s discharge of Moran, and not disclosing exculpatory evidence, the *News-Press*'s actions seemed even more reasonable. Intellectually speaking, what harm would disclosing the truth have created for Moran, GCC/IBT, or the General Counsel?

Comparing Moran's discharge to a Kafka novel insults the intellect of Franz Kafka. Moran's discharge was based on a reasonable, but mistaken belief that he violated company policy. For Dorfman to lie, in the first place, was inexcusable. For Moran, GCC/IBT, and the General Counsel to condone the lie was reprehensible. Moran explained that he did not disclose Dorfman's lie for strategic litigation purposes. (Tr. 1498-99). The ALJ's Decision does not effectuate the purposes of the Act; the Decision is a miscarriage of justice.

The question that must be asked in this situation is "why?" What possible reason could GCC/IBT, Moran, and/or the General Counsel have to not inform the *News-Press* that it relied on a mistaken, good faith belief to discharge Moran? Moran knew of Dorfman's lie "within a day or two after his termination," and did nothing. (Tr. 1097). Moran had told Ms. Apodaca, upon leaving the *News-Press* facility for his suspension that, "I would tell her if I remembered anything else …" (Tr. 1474). Moran's discharge letter stated that cleaning out Dorfman's desk was part of the totality of the circumstances behind Moran's discharge. (G.C. Ex. 147). Moran

actually testified that he "kept quiet" about being "fired over a lie" because he "knew [his termination] would be the subject matter of a future court hearing." (Tr. 1498-99). And, Moran never demanded nor authorized GCC/IBT or the General Counsel to seek his reinstatement. (Tr. 1504).

Equally culpable was GCC/IBT. Moran testified that he informed GCC/IBT attorney, Ira Gottlieb, of Dorfman's lie. (Tr. 1496). This occurred "within a day or two" of Moran's termination. (*Id*). GCC/IBT counsel Gottlieb even contacted Dorfman to confirm that Dorfman lied to Ms. Apodaca. (RESP. 1122). Dorfman and Gottlieb exchanged emails and spoke on August 26 and 27 and September 2, 2008. (RESP. 1112 at 24, 93, 94).

Compounding this deceit was the fact that Region 31 confirmed through an affidavit given by Dorfman on or about September 18, 2008, that Dorfman lied to Ms. Apodaca about naming Moran as the individual that cleaned out his (Dorfman's) desk. (Tr. 1015, 1018).

Every interested party, save the *News-Press*, knew the truth, yet did nothing.

This allegation reflected a perverse application of the Act. The *News-Press* legitimately relied on a statement from Dorfman naming Moran as the individual who cleaned out Dorfman's desk. Within a few days, Moran knew that Dorfman had lied to the *News-Press* and that the *News-Press* relied on Dorfman's lie. (Tr. 1496). Within a few days of Moran's termination, Dorfman knew that the *News-Press* had relied on his lie to Ms. Apodaca to discharge Moran. (*Id*). GCC/IBT knew, within a few days of Moran's discharge, that Dorfman lied to Ms. Apodaca and that the *News-Press* relied on Dorfman's lie to discharge Moran. (*Id*). Finally, Region 31 confirmed that Dorfman lied to Ms. Apodaca and knew that the *News-Press* relied on Dorfman's lie to discharge Moran. (Tr. 1015, 1018).

GCC/IBT filed NLRB Charge No. 31-CA-28890 on September 2, 2008 – two days after the *News-Press* discharged Moran. (G.C. 1(mm)). The allegations pertaining to Moran were not

issued in a complaint until March 24, 2009. (G.C. Ex. 1(ffff)). It took the Region seven months to issue a complaint on the matter; the Region did not comport with Section 10(m) of the Act. Furthermore, not until June 1, 2009, at the hearing, did the *News-Press* learn of Dorfman's lie to Apodaca. (Tr. 978). This allegation was shameful and reflected poorly on the Agency, as a whole. Justice demands that this allegation be dismissed.

XI. ALLEGATIONS PERTAINING TO BARGAINING

The ALJ erroneously described the allegations of the complaint with respect to bargaining. (ALJD 123:23-38). At the hearing, in response to a Motion for a Bill of Particulars, the ALJ granted the *News-Press*'s motion and the General Counsel elected to strike the "but are not limited to" language of complaint Paragraph 20. (Tr. 97-98). The ALJ's Decision failed to acknowledge his own ruling, in this regard.

The bargaining allegations contained two distinct legal concepts: 1) the *News-Press* insisted on proposals; and 2) proposals on management rights, grievance and arbitration, union bulletin board, and discipline and discharge were "predictably unacceptable to the union." (GC 1(ffff), at Para. 20(b)). Significantly, GCC/IBT and the *News-Press* both testified that neither party had adopted a final position on any unresolved subject matter. (Tr. 2032-33; 2484). With this admission, it boggles the conscience that the *News-Press* insisted on any proposal.

To determine if something was "predictably unacceptable," there must exist a baseline from which to make a prediction. The *News-Press* provided industry contracts, ***and contracts agreed to by GCC/IBT*** where GCC/IBT or other newspapers agreed to the exact same language proposed by the *News-Press*. In spite of this evidence, the ALJ found a violation of the Act.

To understand the issues, the *News-Press* will separate them by subject (e.g., Management Rights, Grievance and Arbitration, Union Bulletin Board, Discipline and Discharge), address whether each of these proposal were insisted upon and "predictably

unacceptable to the union," and address the two remaining issues (the purported insistence on a management rights clause, and the overall conduct allegation).

The backdrop to these negotiations must be considered when evaluating the conduct of ***both*** parties when analyzing the General Counsel's case. GCC/IBT is far from an innocent. GCC/IBT's bad faith proposals have frustrated an agreement.

A. BACKGROUND

The *News-Press*'s goal in these negotiations is to reach a contract. (Tr. 2368-69). At the time of the hearing the *News-Press* and GCC/IBT had met 27 times since the inaugural meeting of November 13, 2007. (Tr. 2511). In an effort to reach agreement, the *News-Press* agreed on or about May 9, 2008 to use the assistance of Commissioner Jim Rucks of the Federal Mediation and Conciliation Service. (G.C. 54).

In the course of bargaining, the *News-Press* submitted 48 written counter-proposals to GCC/IBT. (G.C. 301-06, 308-21, 325-26, 331-32, 334-40, 361-63, 369-72, 378, 383, 393, 395, 401, 413, 417, 424, 440). Many of the proposals contained bargaining notes, explaining, in writing, the particular reason the *News-Press* rejected GCC/IBT's proposal on the matter and/or why the *News-Press* proposed particular language.

The parties reached tentative agreements on 16 issues:

1. Equal employment opportunity policy – tentatively agreed to on February 12, 2008. (G.C. 312);
2. Short-term disability – tentatively agreed to on February 14, 2008. (G.C. 310);
3. Long-term disability – tentatively agreed to on February 12, 2008. (G.C. 311);
4. Military leave – tentatively agreed to on February 14, 2008. (G.C. 326);
5. Employee discount – tentatively agreed to on February 15, 2008. (G.C. 320);
6. Death and dismemberment insurance – tentatively agreed to on February 15, 2008. (G.C. 335);

7. Separabilty and savings provision – tentatively agreed to on February 26, 2008. (G.C. 336);

8. Death in the family – tentatively agreed to on April 3, 2008. (G.C. 371);

9. Jury duty – tentatively agreed to on May 15, 2008. (G.C. 316);

10. Non-harassment – tentatively agreed to on May 15, 2008. (G.C. 383);

11. Domestic partnership – tentatively agreed to on May 15, 2008. (G.C. 339);

12. Parties and terms of agreement – tentatively agreed to on June 3, 2008. (G.C. 301);

13. Recognition – tentatively agreed to on June 3, 2008. (G.C. 302);

14. Sick leave – tentatively agreed to on January 14, 2009. (G.C. 431);

15. Contract integrity – tentatively agreed to on January 14, 2009. (G.C. 432); and

16. Full-time status – tentatively agreed to on January 14, 2009. (G.C. 435).

The initial bargaining session of November 14, 2007 occurred as a result of a September 17, 2007 telephone call between the *News-Press* negotiator L. Michael Zinser and GCC/IBT negotiator Nicholas Caruso. (G.C. 5). The parties agreed to have another telephone discussion on September 20, 2007. (G.C. 6). In advance of the September 20, 2007 telephone call, the *News-Press* submitted proposed ground rules in an effort to facilitate negotiations. (G.C. 7). After the phone call, on September 25, 2007, the *News-Press* confirmed and reserved the FMCS in Glendale, California as the negotiation site. (G.C. 9). On September 25, 2007, GCC/IBT agreed to the Glendale location; agreed to split the cost of negotiation meeting rooms 50/50; meet two consecutive days per week, meeting from 9:30 am to 5:30 pm, "as the general rule;" turning off cell phones; no smoking during the meetings; agreed to excluding media from negotiations; and agreed to giving management at least seven days' notice if a committee member is to attend negotiations. (G.C. 8; Tr. 2409-2413).

Thereafter, on October 1, 2007, GCC/IBT requested moving the negotiation from Glendale to the Santa Barbara area. (G.C. 10). On October 2, 2007, the *News-Press* obliged. (G.C. 11). Additionally, the *News-Press* clarified, in response to GCC/IBT's letter that the company was "going to wait to see what the union proposes," rather than proposing a deviation from the status quo. (*Id* at 2). The company also requested "in the interest of expediting matters" that GCC/IBT provide its proposals in advance. (*Id*). Thereafter, GCC/IBT, on October 15, 2007, wrote, in relevant part:

> It is my understanding that you want to know what the Union's agenda is for excepting or changing the status quo prior to determining where Management stands on these issues. I accept that as a logical and reasonable position. It is possible that our agenda may include discussion and an exchange of ideas on issues with Management to improve efficiencies and working conditions in the newsroom. This may not be reflected in our initial proposals as specific contract language.
>
> I would also hope that Management would take a more proactive approach to creating an initial Agreement that established newsroom standards and working conditions that demonstrate their commitment to improving the quality of the paper and their dedication to the integrity of news journalism. I have reservations with providing you with our initial proposals or agenda in advance. If the Publisher has a vision of what she wants the *News-Press* newsroom to be, we would like to exchange agendas in our first meeting rather than listen to Management's reactions to our ideas….

(G.C. 12).

On October 17, 2007, the *News-Press* wrote, in relevant part:

> At this point, we really have nothing more to say concerning the substance of bargaining. We understand your position, that you are not required to provide us your initial proposals prior to the meeting. It was just a request. We shall anticipate we shall see proposals from the union on November 13, 2007. With respect to *Santa Barbara News-Press* proposals, our position remains as previously stated in previous correspondence. We shall respond in good faith to the proposals of the union.
>
> We certainly do hope the union's proposals will confine themselves to mandatory subjects of bargaining affecting wages, hours, and working conditions. Not having seen any of the union's proposals, we shall withhold judgment until we do see them.

> ***We sincerely hope that the union does not consume our valuable bargaining time with permissive, non-mandatory subjects of bargaining.***

(G.C. 13) (emphasis added).

In response, on October 20, 2007, GCC/IBT wrote, in relevant part:

> I received your letter of October 17th and was somewhat troubled by your comments: "*We certainly do hope the union's proposals will confine themselves to mandatory subjects of bargaining affecting wages, hours, and working conditions*." And "*We sincerely hope that the union does not consume our valuable bargaining time with permissive, non-mandatory subjects of bargaining*." The members have expressed concerns to me which will be shared with Management in the form of language proposals on matters to be discussed. While the parties are legally compelled to bargain on mandatory subjects of bargaining, permissive subjects are allowed to be raised by either party. As you are aware, the responding party may choose to refuse to bargain at that time or later in the process. Should Management feel a need to express a concern that falls under the category of a permissive subject of bargaining, the Union Committee will grant you the courtesy acknowledging that the matter may be important to you. If we are to have fruitful and productive negotiations, I would hope the parties could be open to hearing out the other on their issues and making a good faith effort to resolving our problems to the extent we're able, whether we are legally bound or not.

(G.C. 14)(italics in original).

Thereafter, on October 22, 2007, GCC/IBT unleashed an extraordinary voluminous 59-point information request, erroneously dated October 20, 2007, per the fax coversheet, asking for a panoply of information "no later than November 5, 2007." (G.C. 15). On October 23, 2007, the *News-Press* acknowledged receipt of the information request and explained that it would do its best to respond prior to the first bargaining session. (G.C. 16). Additionally, the *News-Press*, on October 23, 2007, wrote another letter to GCC/IBT regarding permissive subjects of bargaining stating, in relevant part:

> This letter will acknowledge receipt by fax on October 22, 2007 of a letter dated October 20, 2007. My letter dated October 17, 2007 was written for a specific purpose. It was written to ask that the union not waste valuable time on permissive, non-mandatory subjects of bargaining. You certainly can expect that *Santa Barbara News-Press* will exercise its rights under the National Labor Relations Act to limit and direct discussions to mandatory subjects of bargaining.

(G.C. 17).

Thereafter, on November 1, 2007, GCC/IBT sent the *News-Press* its Opening Proposal. (G.C. 18). The Opening Proposal included a number of permissive, non-mandatory subjects of bargaining that were at the core of the organizing effort of the employees – including a proposal designed to shift the control of the content of the *News-Press* from the publisher to the employees. To wit:

WORK ASSIGNMENTS

1. An employee shall not be required to perform, over the employee's protest, any practice which compromises the employee's integrity.

2. An employee shall not be required to use his/her or her [sic] position as an employee for any purpose other than performing the duties of their position.

3. Substantive changes in material submitted shall be brought to the employee's attention before publication. An employee's byline or credit line shall not be used over the employee's protest.

4. An employee shall not be required to gather, write, edit, photograph or process anything for publication that is malicious, distorts the facts or creates an impression which the employee knows to be false. If a question arises as to the accuracy of printed material or photographs, no correction or retraction of that material or photograph shall be printed without prior consultation with the employee concerned.

5. An employee may not be disciplined for refusing to cover a story or perform a task that is unethical, immoral or unsafe. An Employee may request and shall receive a written explanation from Management in instances when an Employee is given an assignment that violates this section.

6. An Employee may request and shall receive a written explanation from Management in instances when significant changes are made to a story, photo or graphic or the story, photo, or graphic is not published. An employee may also request and shall receive a written explanation from Management in instances when the employees has submitted a written story, photo or graphic proposal and that proposal is denied.

7. No writer shall be required to serve as a photographer, and no photographer shall be required to serve as a writer as a condition of employment, subject to the following understandings:

a. Reporters may take pictures and photographers may write stories, but a reporter's competence shall in no instance be judged by his/her work with a camera and a photographer's work shall in no instance be judged by his/her writing. The two functions belong to two different persons and shall not be required of one as a condition of employment.

b. Photographers are expected to obtain the correct names of persons in pictures for use in cutlines, when a reporter is present; and, when a reporter is not present, to bring back information for cutlines.

c. Reporters are not expected to process their photo images.

8. Section 7 is designed to be protective rather than restrictive, and interpretations of it shall lie with the Employer and the Union Representatives and not with an individual.

9. Each employee shall furnish the Employer with conscientious service for the entire period of time he/she is employed each day, and no employee shall be required to perform an excessive amount of service, constituting, in fact, an unreasonable workload.

****

(G.C. 18 at 4-5). Also included in GCC/IBT's Opening Proposal was:

USE OF FREELANCE MATERIAL

Freelance work by contributors from outside the regular staff that is assigned or agreed to by editors shall not exceed _____ pieces per month. This figure reflects what the parties agree to be the typical number of freelance submissions for a daily newspaper that is comparable to the *Santa Barbara News-Press*.

Changes to the figure may be made by mutual agreement between the Employer and the Union. The Employer shall notify the Union in writing bimonthly of the specific items in this category that have appeared in the *Santa Barbara News-Press*.

Freelance material will not be used to replace or undermine the rights of Bargaining Unit Members including taking assignments first proposed by staff writers.

(G.C. 18 at 13)(blank in original).

Despite the request of the *News-Press* not to make proposals concerning permissive, non-mandatory subject of bargaining, the Union's initial proposal contained the following additional permissive subjects:

1. **Unit Exclusion of Supervisors – (**G.C. 18 at 2). The second paragraph of GCC/IBT's recognition proposal permitted GCC/IBT to insist on going to arbitration over whether or not an individual was a supervisor, manager or confidential employee, rather than leave unit inclusion or exclusion to the exclusive province of the National Labor Relations Board in a unit clarification proceeding.

2. **Other Offices –** (G.C. 18 at 9). Under the title "Job Transfers and Office Relocation," the Union must automatically be recognized as the representative of employees of any bureau that the *News-Press* may establish anywhere in the United States, taking away from any such new operation the right of employees to vote to be represented or not represented.

3. **Other Departments –** (G.C. 18 at 20). A provision whereby GCC/IBT would have to be recognized as the exclusive bargaining representative of any group of employees in departments outside the Newsroom through a card check procedure, taking away from any such employees the right to an NLRB secret ballot election, as guaranteed by law.

In this first-time contract negotiation, GCC/IBT ignored the *News-Press* requests and burdened the negotiations with permissive, non-mandatory subjects of bargaining. The Board, itself, noted:

> It is not unusual for [initial bargaining] to take place in an atmosphere of hard feelings left over from an acrimonious organizing campaign and the individuals sitting at the table may be inexperienced at collective bargaining. In initial bargaining, unlike in renewal negotiations, the parties have to establish basic bargaining procedures and core terms and conditions of employment which may make negotiations more protracted than in renewal contract bargaining.

Lee Lumber and Building Material Corp., 334 NLRB 399 (2001). GCC/IBT chief negotiator Nicholas Caruso, during his cross-examination, agreed with the opinion expressed in the above quote. (Tr. 2024).

Conspicuously omitted from GCC/IBT's opening proposal was any management rights clause. This omission was anything but inadvertent, as time would show.

GCC/IBT did, however, make opening proposals on "disciplinary action" (G.C. 18 at 14); grievance and arbitration (*Id*. at 14-15) and included a sentence on a bulletin board (*Id* at 19). It was from this framework that the parties commenced bargaining.

To prove, by a preponderance of the evidence, that the *News-Press* violated the Act through its bargaining conduct, the General Counsel called a single witness, GCC/IBT Chief Negotiator Nicholas Caruso. The General Counsel called no other committee member, not GCC/IBT counsel Ira Gottlieb, employee Nora Wallace, GCC/IBT representative Marty Keegan, nor former employee Tom Schultz. Oddly, the General Counsel called the following witnesses and bargaining committee members during the hearing, but intentionally avoided asking any questions related to bargaining: Melinda Burns, Dawn Hobbs, Dennis Moran, Marilyn McMahon, and Karna Hughes. The General Counsel called only one of ten bargaining committee members to discuss the intricacies of negotiations. And Mr. Caruso did not even take notes! (Tr. 1942).

In contrast, counsel to and chief negotiator for the *News-Press* personally prepared contemporaneous, detailed, comprehensive, and exhaustive notes of negotiations. (Tr. 2381-2385; RESP. 337, 347, 395, 396, 407, 421, 437, 440, 449, 459, 471, 487, 493, 507, 514, 529, 545, 552, 561, 572, 573, 601, 611, 628, 630, 646, 647); *See Teamsters Local Union No. 122* (*August A. Busch & Co.*,) 334 NLRB 1190, 1215 (2001). This fact alone demonstrated the dedication to bargaining exhibited by the *News-Press* in contrast with GCC/IBT. The *News-Press* engaged a seasoned negotiator who took contemporaneous notes; the *News-Press* negotiator had negotiated, during his career, many contracts covering newsroom employees. (Tr. 2361-62, 2366-67). And, when GCC/IBT negotiator Caruso reviewed ***Mr. Zinser's notes*** it refreshed ***Mr. Caruso's*** memory. (Tr. 2150-53, 2163-65). The ALJ erred by failing to credit the

detailed exhaustive notes of the *News-Press*, instead relying on the cursory, generalized, non-contemporaneous, unauthenticated "notes" of various GCC/IBT agents recalling bargaining.

The ALJ manipulated the record to suggest that Caruso had negotiated newsroom contracts. (ALJD 124:7). This was false. These negotiations were Caruso's ***first ever*** newsroom contract. (Tr. 2023). True to his inexperience, Caruso did not take notes; he assigned note-taking to novice individuals with no familiarity with the bargaining process. (Tr. 1941, 2024). In addition, GCC/IBT rotated the note taking responsibility so that there was no consistent recorder of what transpired. GCC/IBT's notes were a patchwork of impressions from unseasoned individuals with no background in collective bargaining. It was error, therefore, for the ALJ to rely on any notes taken by GCC/IBT as evidence and to suggest that the notes were Caruso's personal notes. (ALJD 129:20-23).

B. MANDATORY SUBJECTS OF BARGAINING

A management rights article is a mandatory subject of bargaining. *See NLRB v. American Nat'l Ins. Co.*, 343 US 395, 409 (1952). A grievance and arbitration article is a mandatory subject of bargaining. *See Litton Fin. Printing Div. v. NLRB*, 501 US 190, 199 (1991). A discipline and discharge article is a mandatory subject of bargaining. *See Aramark Educational Servs.*, 355 NLRB No. 11, slip op at 22 (Feb. 18, 2010). And, by virtue of the *News-Press* proposing a bulletin board article, it became a "term and condition of employment" for bargaining. *See Beverly Health and Rehabilitation Servs., Inc.*, 335 NLRB 635, 654 (2001)(citing *West Lawrence Care Ctr.*, 308 NLRB 1011, 1015 (1992); *AZ Portland Cement Co.*, 302 NLRB 36, 44 (1991); *Pioneer Press*, 297 NLRB 972, 983-84, 987-88 (1990)). The ALJ did not find, nor did the General Counsel allege that the *News-Press*'s proposals were permissive. Similarly there was no suggestion of impasse. It was intellectually dishonest to

conclude that the *News-Press* violated the Act by "insisting" on a management rights, grievance and arbitration, discipline and discharge, or bulletin board proposal.

C. THE *NEWS-PRESS* LAWFULLY PROPOSED A MANAGEMENT RIGHTS PROPOSAL THAT WAS NEITHER INSISTED-UPON NOR "PREDICTABLY UNACCEPTABLE"

1. FACTS

At the onset of negotiations, GCC/IBT did not propose that the *News-Press* have management rights in a contract. (G.C. 18). This was the starting point for GCC/IBT. Is it really a surprise, therefore, that GCC/IBT filed a charge alleging that a management rights proposal was "predictably unacceptable?"

In fact, GCC/IBT's opening proposal attempted to transfer control of the content from the Publisher of the *News-Press* to the individual employee's subjective notion of "integrity," "malicious," "unethical," "immoral," "unsafe," and/or "unreasonable workload." (G.C. 18 at 3-5). The *News-Press* made a counter proposal on November 14, 2007 (G.C. 303), explaining that its proposal reflected the status quo for the *News-Press* and memorialized that GCC/IBT's proposal sought to seize content control from the *News-Press* and place it in the hands of the employees. The *News-Press* made it very clear that it was opposed to such a transfer of content control. (Tr. 2514; GC 303 at 2).

Mr. Zinser explained that the *News-Press* desired to retain its normal inherent right to control the content of the newspaper and to continue to have supervisors write stories and take photographs, as well as to contract with freelance writers and freelance photographers. (Tr. 2514, 2485; GC 303 at 2; RESP. 493 at 2). This was part of the explanation behind the *News-Press*'s proposals on management rights.

Indicative of the ridiculous nature of this allegation was the fact that GCC/IBT refused to sign off on its own proposed contract language. On June 4, 2008, the *News-Press* was willing to

agree to portions of the management rights language that GCC/IBT had proposed. (RESP. 1040; Tr. 1986-97). When confronted with its own contract language, GCC/IBT refused to tentatively agree upon its own language. (*Id*). If GCC/IBT was truly interested in reaching an agreement, it should have been more than willing to tentatively agree to its own proposed language.

Furthermore, GCC/IBT indicated to the *News-Press* that its proposals on management rights were not unreasonable, much less unacceptable. The ALJ made no mention of this critical admission. In candid discourse, Mr. Caruso informed Mr. Zinser that if GCC/IBT achieved the grievance procedure and a discipline and discharge article to its liking, then the company's management rights clause was "no problem." (Tr. 2180, 2513). How could the *News-Press* be anything other than encouraged by such a statement? Caruso's candor only served to encourage the *News-Press* that if it continued to pursue its management rights proposal, eventually GCC/IBT would agree. This was clearly a reasonable expectation on the part of the *News-Press*.

The notion of the *News-Press*'s management rights proposal being "predictably unacceptable" strains credulity. As an initial matter, predictably unacceptable requires a baseline from which to predict. In as much as the Board is to refrain from getting involved into the substance of proposals and is to only referee the process, the ALJ's findings went to the substance and constituted his subjective views of the proposals.

"Predictably unacceptable" tacitly demands that the Board take position on the substance of a proposal. This analysis is beyond the authority of the Board. The General Counsel, in prosecuting this case sought to require the *News-Press* to make a concession based on what GCC/IBT – subjectively – wants. The ALJ obliged. The ALJ's Decision requires the Board to pen a contract between the *News-Press* and GCC/IBT whereby the Act is used to force the *News-Press* to accept proposals made by GCC/IBT, or at a minimum, require the *News-Press* to

withdraw its proposals. The Board has never gone that far in fashioning a remedy. *See Public Services of Oklahoma (PSO)* 334 NLRB 487 (2001) enfd.[24] 318 F.3d 1173 (10th Cir. 2003).

2. ARGUMENT

a) The ALJ's Errors were Outrageous

The ALJ erred and engaged in capricious and arbitrary application of law by rejecting the notion that contracts GCC/IBT negotiated and signed and/or industry contracts with language agreed upon served to defend the assertion that the *News-Press*'s proposals were "predictably unacceptable to the union." (ALJD 137:4-8).[25]

The ALJ's conclusion, with respect to contracts that demonstrated the *News-Press*'s affirmative defense, was stunning and contradictory to his statements and ruling at the hearing. The General Counsel objected to the *News-Press* introducing into evidence contracts that contained similar management rights articles, discipline and discharge articles, grievance and arbitration articles, and bulletin board articles that the General Counsel and union contended were "predictably unacceptable." (Tr. 2486-87). The ALJ engaged in a thoughtful discussion on this issue explaining that "predictably unacceptable is conceptually different from proposals which are – how to put it? Which leave the union in a state less well off than if they had no contract at all. Those really are – they may overlap, but they really are different." (Tr. 2491).

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[24] The *News-Press*, the General Counsel, and GCC/IBT all recognized that *PSO* was ALJ Anderson's case.

[25] The ALJ erred by attempting to muddy the record by adding the term "acceptable" to the analysis of "not predictably unacceptable" in an attempt to equate the two terms. (ALJD 137: 4-8). The General Counsel prosecuted this case claiming that the *News-Press*'s proposals on management rights, discipline and discharge, grievance and arbitration, and bulletin board "were predictably unacceptable to the union." The *News-Press*, therefore, needed only to assert, as an affirmative defense, that these proposals were ***not*** predictably unacceptable, in contrast with a burden of proof demonstrating that the proposals were "acceptable" to GCC/IBT. This subtle word ploy did little to advance the purposes of the Act. The ALJ was intellectually dishonest, in this regard.

The ALJ continued, "and these proposals that are in litigation are not gratuitously insulting, I think, with the Board's analysis. They are economic matters. (*Id*). Further, the ALJ opined:

> … when you phrase as predictably unacceptable instead of alleging that the language (is) something which will reduce the union's condition to below that of its nature state. That is, the state before it has a contract.
>
> You're putting into play much more than that argument. You're putting into play that it's unacceptable to unions or this union. And that, I think, brings into play and allows the Respondent to show it's not predictably unacceptable.
>
> ****
>
> But that I think that clauses that have been negotiated in the industry, particularly clauses that have been negotiated nationwide in the – with this union. By that, I don't mean necessarily a particular local, may come in. …

(Tr. 2493-94). Critically, the ALJ concluded:

> But the way [the complaint]'s been pled sustains your theory of defense. It makes it, not sustains it, makes it relevant. And the objection is overruled.

(Tr. 2496).

In light of the ALJ's ruling at the hearing, his contradictory finding in his Decision was grave error. The ALJ stated "clauses that have been negotiated in the industry, particularly clauses that have been negotiated nationwide in the – with this union" were relevant. (Tr. 2494). Inexplicably, in his Decision, the ALJ – while acknowledging these contracts' "logical force" – determined that the industry contract and contracts negotiated by GCC/IBT were not material to the case. (ALJD 137:2-8). The cursory treatment of the five contracts offered into evidence (RESP 1059, 1061, 1048, 1052; GC 66) was an affront to the unbiased administration of the Act. Of course these contracts and their language was relevant to the matters litigated – the ALJ admitted so. Rather than addressing or even acknowledging the contracts, the ALJ attempted to ignore them in an effort to "make them go away." The ALJ recognized that the General Counsel pled the complaint, making the industry contracts relevant, yet in spite of acknowledging the

contracts' relevance, the ALJ simply ignored these critical pieces of evidence demonstrating that the *News-Press*'s proposals were not "predictably unacceptable." This was error.

b) The *News-Press* did Not Insist on a Management Rights Proposal

The ALJ acknowledged that the *News-Press* and GCC/IBT were not at impasse regarding management rights. (ALJD 134:17-18). Therefore, it could not be said that the *News-Press* insisted on a management rights proposal. Perhaps recognizing this, the ALJ never affirmatively concluded that the *News-Press* insisted on a management rights clause in violation of the Act. Instead, in the ALJ's conclusions of law, he meekly stated that the *News-Press* bargained "in bad faith … by insisting as a condition of reaching any collective bargaining agreement … that the union agree to language in the contract that would grant the Respondent unilateral control for many terms and conditions of employment and leave the Union and the bargaining unit employees worse off than if they went without an agreement." (ALJD 145:48-146:2). The ALJ dismissed all other allegations of the complaint. (ALJD 151:15-16). It was conspicuous, therefore, that management rights – which were explicitly described in the complaint – were never explicitly mentioned in the conclusions of law.

The ALJ advanced a nonsensical point namely "if [the *News-Press*] was prepared to stand firm on insisting that the [management rights] language be carried forward into new contracts, [GCC/IBT]'s representational role as envisioned by the statute and Section 8(a)(5) of the Act would be eviscerated in perpetuity." (ALJD 139:39-42). Despite the drama associated with this "finding," the ALJ misrepresented law and fact. The ALJ narrowly viewed GCC/IBT's "representational role" as limited to waiving and not waiving particular rights. In reading the Act, and exploring precedent, the role of a union is more than waiving and not waiving particular rights. Additionally, the *News-Press*'s proposal was that only management rights carry forward

until a new contract is reached, or a unilateral change can occur through some other, lawful means. There is no "indefinite" time span.[26]

In addition the ALJ demonstrated political bias by concluding that the management rights clause would provide "the ***Union*** no rights whatsoever." (ALJD 140:7-8). The Act confers no rights on a union. The Act confers rights upon ***employees***, not a labor organization. *See* 29 U.S.C. § 151, 157. The ALJ apparently forgot this tenet. Indeed, the ALJ repeated this error by finding that if GCC/IBT agreed to the *News-Press*'s proposals, "the ***Union*** and the unit employees[27] (would be) worse off in terms of the statutory bargaining rights the Act provides than if they had not agreed to a contract at all." (ALJD 141: 8-11). An analysis of the Act yields no language that confers any bargaining rights upon a union. Again, the Act empowers employees, not a union with rights. The ALJ's bias, in this regard constituted error.

c) The *News-Press*'s Management Rights Proposal was Not "Predictably Unacceptable.

When examined by objective standards, the *News-Press*'s proposal on management rights was anything but "predictably unacceptable." In fact, GCC/IBT negotiated and executed CBAs in the newspaper industry with similar comprehensive, detailed management rights clauses. (RESP. 1059 (*Bucks County Courier Times*) at 10-11; RESP. 1061 (*Richmond Times-Dispatch*) at 11-12). Counsel to the *News-Press* negotiated these contracts (Tr. 2498). Counsel to the *News-Press* had also negotiated contracts for other media companies with similar management rights language. (RESP. 1048 (Clear Channel Outdoor/Dallas) at 48-49; RESP. 1052 (*The Spokesman-Review*) at 21-22). The notion that the *News-Press*'s management rights clause was

[26] This language is in response to the Board's position on waiver and the contract coverage.
[27] The ALJ's conclusion with respect to employees in this regard was also untrue. The *News-Press* proposed a dispute resolution procedure that no other group of employees at the *News-Press* enjoyed; GCC/IBT admitted this. (Tr. 2147-48). There was nothing in the record to suggest that any employee would have been "worse off" had GCC/IBT agreed to the *News-Press*'s proposals.

predictably unacceptable was unfounded. The personal/professional experience of the *News-Press* chief negotiator was that unions representing newspaper industry employees routinely agreed to detailed, comprehensive management rights clauses.

In *Midwest Television, Inc.,* 349 NLRB 737, 783 (2007) (citing *Logemann Bros. Co*., 298 NLRB 1018 (1990)), the Board adopted the following statement:

> Cases are legion holding that the Board will not analyze an employer's particular contract proposal to determine whether it would be "acceptable" to the union … proposing a broad management rights clause, such as the one here, does not itself mean that the employer engaged in bad-faith bargaining.

In spite of this edict, and the legion of cases stating that the standard is not whether a contract proposal "would be acceptable to the union," the General Counsel, in the Amended Consolidated Complaint threw precedent to the wind and argued that the *News-Press*'s management rights proposal (as well as grievance, bulletin board, and discipline and discharge proposals) was "predictably unacceptable to GCC/IBT." (G.C. 1(ffff) at 11).[28]

Further supporting the realistic belief that the *News-Press* could achieve its management rights goals were the statements made by GCC/IBT chief negotiator Nicholas Caruso at the bargaining table. Mr. Caruso consistently articulated that GCC/IBT did not have a big problem with most of the *News-Press* management rights proposal. (Tr. 2514, 2516, 2558; G.C. 388; RESP. 493). He excepted from this, of course, that portion of the management rights proposal that reserved to the *News-Press* the control over content of the newspaper. Other than content control, Mr. Caruso gave the *News-Press* every encouragement that it could achieve its management rights goals if *Santa Barbara News-Press* agreed to a discipline and discharge article with a just cause standard and a grievance and arbitration procedure to its liking. In fact,

[28] Indeed, the General Counsel argued, in response to an objection, that Mr. Zinser's "state of mind" was relevant "with respect to whatever his proposals were predictably unacceptable to the union." (Tr. 2639). Of course, every proposal was a *News-Press* proposal, not Mr. Zinser's proposal. (Tr. 2382, 2484, 2504, 2506, 2507, 2563, 2642, 2716).

the parties were in agreement on portions of the management rights article. (RESP. 611). GCC/IBT squarely asserted that it had not asserted a final position on the Company's management rights proposal as of the last bargaining session in this case. (RESP. 647). Only an inexperienced, mediocre negotiator for management would abandon its proposal in view of the statements made by GCC/IBT's chief negotiator.

d) The Bargaining History

1. November 14, 2007 Negotiations

The *News-Press* made its initial management rights proposal on November 14, 2007 as Counter-Proposal Number 3. (G.C. 303; RESP. 347, November 14, 2007, Zinser Notes, pg. 1). There was very little discussion of the proposal on that date. GCC/IBT chief negotiator Caruso expressed a hope that it had a statement of the reserved rights doctrine in it. (RESP. 347, Zinser Notes, pg. 2). He further coupled it with a need on the part of GCC/IBT to have an adequate method of resolving disputes by an impartial third party. (*Id*).

2. April 2, 2007 Negotiations

The next time management rights was mentioned at the bargaining table was on April 2, 2008. (RESP. 459, April 2, 2008 Zinser Notes, pg. 1). Mr. Caruso raised it in the context of discipline and discharge, grievance and arbitration, and management rights. (*Id.*; Tr. 2513). He stated that he was not really so concerned with management rights if he could achieve third party arbitration and a just cause standard in the discipline and discharge section of the contract. (*Id.*; Tr. 2513).

3. May 15, 2008 Negotiations

On May 15, 2008, the *News-Press* attempted to engage GCC/IBT in discussions about the management rights clause. (RESP. 493, May 15, 2008, Zinser Notes, pg. 2, Para. 4). Again, Mr. Caruso stated that if GCC/IBT could get discipline and discharge and grievance procedure to

their liking, based on his memory, he did not have a lot of problems with the *News-Press*'s management rights article. (Tr. 2514; RESP. 493, May 15, 2008, Zinser Notes, pg. 2, Para. 4). The *News-Press* then asked Mr. Caruso for GCC/IBT's position on management rights as a stand-alone proposal. (Tr. 2514; RESP. 493). Mr. Caruso again asked about a statement of the reserved rights doctrine. (*Id.*; Tr. 2514-15). It was pointed out that that was included in Section 1 of the company's proposal. (RESP. 493; Tr. 2515). GCC/IBT was asked to address the management rights proposal that day. (RESP. 493 at pg. 3; Tr. 2515). GCC/IBT was reluctant to do so. (Tr. 2515). Mr. Caruso asked for a Microsoft Word version of the proposal. (RESP. 493 at P3). The *News-Press* explained to GCC/IBT its rationale for wanting a detailed, comprehensive management rights article. (RESP. 493; Tr. 2515). It was explained that the longer, more detailed the clause is, the more likely the employer has a defense for the unilateral action that's taken; the shorter, more general a clause is, the less likely it would be that management could use it to justify action. (RESP. 493). In concept, Caruso agreed with that. (*Id*). Pursuant to Caruso's request, a Microsoft Word document was sent to him. (*Id*). However, he was unable to address management rights on May 15, 2008. (*Id*).

4. June 3 & 4, 2008 Negotiations

On June 3, 2008, GCC/IBT presented a written response to the *News-Press*'s proposal on management rights. (G.C. 388). The document was not a proposal; it was simply a response to the company's proposal. (RESP. 507). Significantly, GCC/IBT would not agree to Section 2(a) of the *News-Press* proposal because the *News-Press* sought to retain content control in that section. (G.C. 388; RESP 507). The *News-Press* specifically explained why it proposed Section 6; that in order for management rights to be considered part of the post-expiration status quo, the contract would need to contain a clause like Section 6. (RESP. 507 at Para. 2). Further, GCC/IBT "adamantly disagree[d]" with the position stated in Bargaining Note 3 of the *News-*

Press's initial proposal that GCC/IBT vowed to discuss at a later date. (G.C. 303; G.C. 388, Para. 4).

Bargaining Note 3 stated:

> The Union's proposal on "work assignments in effect transfers control of content from Management (where it resides now) to the individual employee's subjective notion of 'integrity,' 'malicious,' 'unethical,' 'immoral,' 'unsafe,' 'unreasonable work load,' *Santa Barbara News-Press* is not willing to so transfer control. That should remain with the publisher.

(*Id.* at 5).

That very same day, the *News-Press* presented GCC/IBT with a written response to GCC/IBT's response on the company's management rights proposal. (G.C. 389; RESP. 507, pg. 6). The *News-Press* response pointed out that GCC/IBT still had not made a counter-proposal on the subject of management rights. (*Id.*; Tr. 2516-2517). Additionally, the *News-Press* specified content control as very important to the *News-Press*. The *News-Press* response stated:

> We would urge the Union to accept, without qualification, our Section 2(a) to determine the content of *Santa Barbara News-Press*, including, but not limited to, editing, presentation, and placement of all stories, columns and photos.

(G.C. 389). The *News-Press* strongly urged GCC/IBT to stay away from content control.

The next day, on June 4, 2008, GCC/IBT made a counter proposal. (G.C. 392). GCC/IBT again refused to cede content control to the *News-Press*, as evidenced by the language permitting an employee to have the right to remove his or her byline, a restriction on managers and supervisors performing work, restrictions on the use of freelance writers and photographers and the following language:

> Rights as provided in this Article shall not supersede Managements [sic] legal obligation to bargain over changes that substantially affect the wages, hours, and working conditions of Bargaining Unit Employees.

(G.C. 392 at 2). The effect of that language was to nullify the management rights clause. Caruso, at negotiations, stated: "I don't want management to have the unilateral right to change

things." (RESP. 514 at 4). This statement was an anathema to the notion of management rights. In essence, GCC/IBT proposed that the *News-Press* have management rights, but that the *News-Press*'s rights be illusory. This circuitous logic was bad faith bargaining and frustrated the bargaining process.

After a review of GCC/IBT's proposal, the *News-Press* was willing to agree to Section 1 and Sections 2(c), (f), (g), (i), (l), (o), (p) and (q) of GCC/IBT's proposal. The *News-Press* negotiator in handwriting bracketed the sections it was willing to agree upon and handed the document, so marked, across the table to Mr. Caruso for him to initial it as tentatively agreed. (Tr. 2519, 2523, 2525; RESP. 514, 1040). Mr. Caruso refused to agree to this language that GCC/IBT had, in fact, itself proposed. (Tr. 1519; RESP. 514, 1040). GCC/IBT negotiator Caruso stated that he would only be willing to tentatively agree to entire articles. (*Id*). GCC/IBT was unwilling to agree to portions of an article it had proposed. (Tr. 2519; RESP. 514, 1040).

5. July 10, 2008 Negotiations

The subject of management rights was again briefly discussed on July 10, 2008. (RESP. 529). GCC/IBT negotiator Caruso specifically stated that he understood that the parties have different perspectives on things like management rights. (Tr. 2521-22). He did not agree but he understood there is a different perspective. (RESP. 529, pg. 3, Para. 4; Tr. 2521-22). Mr. Caruso again talked about the issues of management rights, third party arbitration and just cause together. (Tr. 2521-22; RESP. 529). As he had stated many times before, Mr. Caruso stated GCC/IBT did not have a big problem with most of the *News-Press*'s management rights proposal; he again indicated that GCC/IBT needed to have a just cause standard and arbitration. (RESP. 529, pg. 3).

6. January 15, 2009 Negotiations

On January 15, 2009, the *News-Press* asked GCC/IBT if there was any change in GCC/IBT's position regarding management rights. (RESP. 611 at 3). In response, GCC/IBT stated that it would "reserve judgment" on that question for a later time. (*Id*). This was the first time the subject matter had been raised substantively by either party since the *News-Press*'s June 4, 2008 negotiations. (Tr. 2521).

7. February 26, 2009 Negotiations

On February 26, 2009, the *News-Press* provided GCC/IBT a document inquiring about GCC/IBT's position on management rights. (G.C. 446). The document chronicled the history of the proposal from June 3, 2008 to January 15, 2009 and ended with the following question: "Has the union's position changed in any respect?" (*Id*). At approximately 2:18 pm, GCC/IBT called a caucus and remained in caucus until 3:56 pm. With respect to the question posed, Mr. Caruso was unable to answer and said he would respond in writing next week. (RESP. 630, pg. 2).

On March 10, 2009, GCC/IBT responded to the *News-Press*. (G.C. 118). In the letter, Caruso "punted" to "legal counsel" the decision to not agree to the *News-Press*'s proposed Section 6 of the management rights proposal. (*Id* at 1-2). Significantly, GCC/IBT admitted that the *News-Press* attempted to engage GCC/IBT "to sign off on portions of a proposal." (*Id*. at 2). GCC/IBT reiterated its refusal to sign off on parts of an article, rather insisting on agreement on a complete article before signing off on it. (*Id*). The letter only addressed Section 6 of the *News-Press*'s proposal.

8. April 22, 2009 Negotiations

On April 22, 2009, at negotiations, the *News-Press* again, in writing, addressed management rights. (RESP. 647, 653). The *News-Press* stated that GCC/IBT's March 10, 2009 letter did not answer the *News-Press* February 26, 2009 inquiry. (*Id*). GCC/IBT's March 10,

2009 letter only addressed Section 6 of the company's management rights proposal. (*Id*). At 9:50 a.m. the *News-Press* asked GCC/IBT if its position on management rights had changed. Mr. Caruso did not answer until 1:40 pm and at that time he said "No." At the April 22, 2009 negotiations, the *News-Press* asked GCC/IBT directly if GCC/IBT had taken a final position on management rights. (*Id*). GCC/IBT stated: "No." (*Id*). Mr. Caruso would only say that the position of GCC/IBT was unchanged "at this time." (*Id*).

e) An Analysis of the Bargaining History Reveals No Violation of the Act

As the above chronology illustrates, GCC/IBT was not opposed to a long-form management rights article in a new first-time collective bargaining agreement with the *News-Press*. In fact, repeatedly, GCC/IBT chief negotiator Nicholas Caruso stated that he did not have a lot of problems most of the *News-Press* management rights proposal. As previously stated above, other Locals of the Teamsters Union in recent years in the newspaper industry had agreed to detailed, long-form management rights articles, such as that proposed by the *News-Press*. All of them provided for the use of independent contractors; the performance of unit work by supervisors; and a status quo paragraph, similar to Section 6 of the *News-Press*'s proposal. Neither GCC/IBT nor the *News-Press* made a final offer with respect to the subject of management rights. Both parties remained open to discuss counter-proposals. Management rights is clearly a mandatory subject of bargaining. *NLRB v. American Nat'l. Ins. Co.*, 343 U.S. 395, 409, 75 S. Ct. 824, 96 L.Ed. 1027 (1952). To argue "predictably unacceptable" was nonsense given the facts that GCC/IBT agreed to similar proposals at other newspapers.

As the Board explained in *Logemann Bros*.:

> With respect to the judge's view that the proposals made were predictably unacceptable, the Board stated in *Reichhold* that its examination of specific bargaining proposals will not involve decisions "that particular proposals are either 'acceptable' or 'unacceptable' to a party." Furthermore, the Respondent has

> presented uncontradicted evidence that a proposal to eliminate union security was accepted by the Union in contract negotiations with another employer. The Union had also agreed to a virtually identical management-rights clause with another employer. Even in the negotiations at issue here, the Union's July 6 counterproposal to the Respondent actually included proposals to eliminate checkoff and to modify union security by replacing union shop with maintenance of membership.

298 NLRB at 1020 (noting *Reichhold Chemicals,* 288 NLRB 69 (1988), reversed on other grounds sub nom *Teamsters Local 515 v. NLRB,* 906 F 2d 719 (D C Cir. 1990)

D. THE *NEWS-PRESS* LAWFULLY PROPOSED A GRIEVANCE PROCEDURE THAT WAS NEITHER INSISTED UPON NOR "PREDICTABLY UNACCEPTABLE"

1. THE BARGAINING HISTORY

a) November 14, 2007 Negotiations

GCC/IBT, in its opening proposal, proposed a grievance and arbitration clause. (G.C. 18 at 14-15). On November 14, 2007, the *News-Press*, in writing, told GCC/IBT that it would be making a counter-proposal on grievance resolution. (RESP. 347; G.C. 307).

b) February 13 & 14, 2008 Negotiations

On February 13, 2008, the *News-Press* made a counter-proposal regarding the grievance procedure. (G.C. 325). In contrast with GCC/IBT's grievance proposal, the *News-Press*'s proposal defined a grievance as "a claim or dispute with the Company by an employee, employees, or the union, involving an alleged violation by the Company of the express provisions of this Agreement." (G.C. 325). The initial proposal by GCC/IBT failed to define what exactly was a grievance; rather, it subjected virtually any "disciplinary action, controversy, or dispute concerning the application or interpretation of the Agreement" to the grievance and arbitration provision. (G.C. 18).

The *News-Press*'s February 13, 2008, proposal also called for a meeting with the Director of Human Resources and the Associate Editor as part of a Step 2 process, which was very similar to the Union's proposal. (RESP. 325, G.C. 18).

Finally, the *News-Press*'s proposal called for a final step in the grievance procedure, whereby the Co-Publishers made a final decision on a grievance, provided it was not resolved earlier in the process. (G.C. 325). Omitted from the *News-Press*'s proposal was a binding arbitration clause. In response to the proposal, GCC/IBT referred to it as "interesting." (RESP. 396 at 4).

Upon reviewing the proposal again on February 14, 2008, GCC/IBT spokesperson Nicholas Caruso made the curious comment that the proposal was "predictably unacceptable." (RESP. 407). When the *News-Press* spokesperson Zinser explained that that was not the standard, Caruso backed off and acknowledged that the company had the right to make its proposal and said that he (Caruso) could understand why the company wanted its proposal. (*Id*). When specifically asked whether Caruso was saying that there was no circumstance under which GCC/IBT would agree to a procedure that excluded binding arbitration by a third party, Caruso said "no." (*Id*; Tr. 2574). Caruso then said words to the effect that when the Union gets to the point "where that's our ultimate position, I'll let you know." (Tr. 2575). *News-Press* chief negotiator Zinser responded by saying, "Well, that's good to know. That kind of tells me that you're not saying there's no circumstance under which you'll agree to a procedure without binding arbitration." (RESP. 407, pg. 2; Tr. 2575).

The *News-Press* explained that the proposal was a big change from what employees at the *News-Press* currently enjoyed; there was no grievance procedure that currently existed. (Tr. 2575; RESP. 407). Under the *News-Press*'s proposal, the Union/employees can file a grievance and have a multi-step process to try to get resolution. (*Id*). The *News-Press* further explained

that the publishers desired to retain the final say on decisions and that they did not want to relinquish that authority to a third party. (*Id*).

c) February 25, 2008 Negotiations

On February 25, 2008, GCC/IBT provided a "response" to the *News-Press*'s counter-proposal on a grievance procedure. (G.C. 345). The proposal made certain minor modifications to GCC/IBT's initial proposal.

d) April 2, 2008 Negotiations

On April 2, 2008, the *News-Press* made a new counter proposal on the grievance procedure. (G.C. 361). The proposal modified the *News-Press*'s earlier proposal, in relevant part, by proposing that a neutral party from the Federal Mediation and Conciliation Service attempt to mediate the grievance. (*Id* at 1-2). The *News-Press* explained in its bargaining notes that the use of the FMCS was an attempt to find a third party to mediate the dispute and gives the parties the opportunity to air and potentially settle a grievance using a third party. (*Id* at 2; Tr. 2577).

Shortly thereafter, on April 2, 2008, the *News-Press* withdrew its proposal for a No-Strike clause. (G.C. 362). The *News-Press* explained that as arbitration is regarded as the "quid pro quo" for a no-strike clause, the *News-Press*, as a showing of good faith, removed from the table language limiting GCC/IBT's ability to strike. (*Id.*; Tr. 2577-78).

At these negotiations, GCC/IBT, however, hardened its position on the grievance procedure, stating that in order for the grievance procedure to be "legitimate," the *News-Press* ***had*** to agree to certain contract provisions, specifically just cause and arbitration. (Tr. 2557-58; RESP. 459 at 3). Caruso stated that the *News-Press* ***had*** to agree to these provisions "to acknowledge the union's presence." (*Id*).

On April 2, 2008, GCC/IBT made another proposal regarding a grievance procedure. (G.C. 365). GCC/IBT adopted the *News-Press*'s proposal to submit a grievance to the FMCS for an attempt to mediate the dispute, but continued to propose binding third party arbitration and the unilateral option of pursuing expedited arbitration through the American Arbitration Association. (*Id*).

On April 2, 2008, the *News-Press* made a second counter proposal regarding a grievance procedure. (G.C. 363; RESP. 459). While not including third party, binding arbitration, the proposal added some changes requested by the union, including elimination of specific reference to Commissioner Jim Rucks and substituting that the grievance be submitted to Federal Mediation and Conciliation Service without a specific named mediator. (G.C. 363; RESP. 459 at 4). In the bargaining notes following this proposal, *Santa Barbara News-Press* took issue with the position of GCC/IBT that in order to be legitimate a grievance procedure had to provide for just cause and third party, binding arbitration, stating:

> *Santa Barbara News-Press* rejects the notion that a grievance procedure without 'just cause' and 'binding arbitration' by a neutral is illegitimate. Thousands and thousands of employers have written procedures for resolving workplace disputes without the concept of just cause and arbitration. The Union seems to be saying that these employment relationships are not legitimate. *Santa Barbara News-Press* strongly disagrees with that premise.

(G.C. 363 at 2-3). This proposal provided a neutral party a chance to resolve the parties' differences. This proposal was a big concession; this proposal presented a more detailed dispute resolution procedure than any other employee of *Santa Barbara News-Press*.

e) June 11, 2008

On June 11, 2008, *News-Press* chief negotiator Zinser mailed to Nicholas Caruso a copy of the Collective Bargaining Agreement that the Teamsters negotiated with the *Fort Myers News*

Press. (G.C. 66). Significantly, this Collective Bargaining Agreement did not provide for third party, binding arbitration. (G.C. 66; Tr. 2571-72).

f) October 23, 2008

On October 23, 2008, the *News-Press* made a comprehensive proposal for a CBA that incorporated its April 2, 2008 counter-proposal. (G.C. 428 at 25-26). The *News-Press* restated its proposal on February 25, 2009 in a second proposal. (G.C. 442 at 25-26).

2. ARGUMENT

a) The ALJ Erred in His Analysis Regarding Grievance and Arbitration Proposals.

The ALJ took the position that the *News-Press* had to agree to third party binding arbitration. Nowhere in the Act, nor in the annals of Board or judicial precedent, does such a notion exist. The ALJ has, through executive fiat, modified the Act. The ALJ's Decision violates the Constitution.

The ALJ never addressed whether the *News-Press* insisted on a grievance and arbitration procedure; undoubtedly this was because GCC/IBT and the *News-Press* admitted that neither party had insisted on a grievance and arbitration proposal. (RESP. 407, pg. 2; Tr. 2574-75).

The ALJ took the position that as a result of GCC/IBT establishing itself as a bargaining representative, the employees were entitled to "get" something. (ALJD 136:45-49). Again, this is nowhere in the statue or in the annals of case law. The ALJ spoke in generalities, rather than specifics. An impartial view of the facts surrounding the *News-Press*'s proposal on grievance and arbitration compels the dismissal of this allegation.

Furthermore, the ALJ paid no mind to the admission of GCC/IBT that its goal, in its proposals, was to be in a position to grieve and arbitrate content decisions of the *News-Press*. (Tr. 2138). Is it any wonder that the *News-Press* held firm in its position regarding grievance

and arbitration? GCC/IBT acknowledged that its proposals were yet another attempt to invade the content of the *News-Press*. And, in an extraordinarily significant move – a move that the ALJ did not analyze – the *News-Press* withdrew its no strike clause. (GC 362; Tr. 25577-78). The *News-Press* was willing to suffer a strike over its position on the grievance and arbitration proposal.

Finally, the ALJ misrepresented facts concluding that employees would have been "worse off in terms of statutory bargaining rights the Act provides" if GCC/IBT agreed to the *News-Press*'s grievance and arbitration proposal. (ALJD 141: 8-11). This was categorically untrue. The ALJ's rhetoric, in this regard, was not based on any record evidence. As the record reflected, no other group of employees at the *News-Press* have a dispute resolution procedure. Additionally, no other group of employees at the *News-Press* have a third party to weigh in on the grievance, as the *News-Press* proposed by engaging the FMCS. The ALJ's opinion reflects an edict that the *News-Press* must make concessions through negotiations. The Act has never stood for such a biased proposition. *See* 29 U.S.C. § 158(d).

b) The *News-Press* Did Not Insist on a Grievance and Arbitration Proposal.

There was no evidence to support the notion that the *News-Press* insisted on a grievance and arbitration provision. The *News-Press* did not declare impasse; similarly, GCC/IBT did not declare impasse. (Tr. 2484). Furthermore, GCC/IBT's bargaining statements indicated to the *News-Press* that if the *News-Press* continued to bargain on the issue, GCC/IBT might change its position. In essence, GCC/IBT's statement that it was not ruling out ever accepting the company's grievance procedure was a signal that the *News-Press* needed to press on. When the *News-Press* asked GCC/IBT if it was unalterably opposed to ever agreeing to a grievance

procedure without arbitration, GCC/IBT said "no" and that it would let the *News-Press* know if and when that became its ultimate position. (Tr. 2575). GCC/IBT never did so.

Significantly, the *News-Press* withdrew its proposal on a No-Strike clause. (G.C. 362). An arbitration clause and a No-Strike clause have been interpreted to be the quid pro quo for each other. Engaging in a strike, where there is a contractual grievance and arbitration procedure is prohibited self-help under the Act. *See Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); also see *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 369 (1974). The *News-Press* recognized that there was a "national labor policy of relying on arbitration, unless the parties expressly agree that arbitration is not the exclusive remedy." *Hollins v. Kaiser Foundation Hospitals*, 727 F2d 823, 825 (9th Cir. 1984)(Per Curiam)(citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-58 (1965)). In recognition of this national policy, the *News-Press*, through its proposals, removed arbitration as an exclusive remedy. Stated another way, the *News-Press* demonstrated to GCC/IBT exactly how sincere was its belief that the *News-Press* should be the final decision-maker on a grievance by withdrawing a proposal that would have precluded GCC/IBT from going on strike over the grievance. The *News-Press*, through its proposals, made it clear to GCC/IBT that it was willing to endure a strike due to its sincerely held belief that its management decisions should not be subject to third party binding arbitration. GCC/IBT had the option of a strike to resolve a grievance, under the *News-Press*'s CBA proposal.

The evidence in the record reflected that the *News-Press* was willing to meet and discuss the subject of a grievance procedure. The *News-Press* made more than one counter proposal on the subject matter. However, the *News-Press* remained reluctant to agree to binding, third party arbitration. Under the circumstances of this case, any objective person could appreciate why the *News-Press* would be reluctant to agree to arbitration. As we have stated in this brief many

times, GCC/IBT is bent on attempting to control the content of the *News-Press*. GCC/IBT has thus far been unwilling to agree to that portion of the Company's management rights proposal that reserves to the *News-Press* control over content. Additionally, GCC/IBT has been unwilling to agree that biased reporting is cause for discipline or discharge. Both of these positions of GCC/IBT were consistent with its goal of content control. Couple these positions with GCC/IBT's position on work assignments and there exists the possibility and probability that GCC/IBT will grieve and arbitrate content decisions of the *News-Press*. In fact, GCC/IBT chief negotiator Caruso acknowledged that any dispute with a reporter over content could ultimately end up in arbitration under GCC/IBT's proposal. (Tr. 2138).

Contrast the position of GCC/IBT in this case with the CBA negotiated covering the newsroom at *The Spokesman-Review* in Spokane, Washington. (RESP. 1052). While that CBA provided for binding, third party arbitration, its management rights proposal stated, with respect to content:

> This contract shall in no way circumscribe the full freedom and liberty of the Publisher to publish news and editorial opinions the Publisher desires, or to cause to be carried out policies of the Publisher's choosing, with respect to writing, editing, rewriting and reporting for publication.

(RESP. 1052 at pg. 21). That management rights article also provided that the Publisher shall have the right to utilize independent contractor freelance writers and photographers to the extent deemed necessary by News Department management and that managers and supervisors shall have the right to write and/or take photographs for publication in *The Spokesman-Review.* (RESP. 1052 at pg. 21). *The Spokesman-Review* newsroom contract further provided that biased reporting may be cause for discipline or discharge. (RESP. 1052 at pg. 10).

This allegation reflected more of GCC/IBT's weakness, from a bargaining standpoint, than any purported bad faith bargaining on the part of the *News-Press*. The ALJ injected himself

into the substance of bargaining in an effort to undermine the *News-Press*'s bargaining strength. This was not equitable.

c) The Grievance Proposal of The *News-Press* Was Not "Predictably Unacceptable"

"Predictably unacceptable" is a bogus standard, particularly in the instant case. GCC/IBT was dissatisfied with the *News-Press*'s proposal on grievances. Attempting to categorize it as "predictably unacceptable" flew in the face of reality.

GCC/IBT agreed to the same provisions in another CBA. It cannot be said that a proposal with terms already agreed to by GCC/IBT was "predictably unacceptable." *See Midwest Television, Inc.*, 349 NLRB at 783; *Logemann Bros*., 298 NLRB at 1020. Furthermore, counsel to the *News-Press* was familiar with at least one other CBA that did not contain arbitration. (RESP. 1048).[29]

The point of these CBAs was not to demonstrate that GCC/IBT was obligated to agree to the same contract language. Rather, these CBAs demonstrate that the *News-Press*'s proposals were not "predictably unacceptable" as GCC/IBT had already agreed to the same language elsewhere. *See Logemann Bros. Co.*, supra. The General Counsel elected to draft the Complaint as a matter of "predictably unacceptable." (Tr. 2496). The defense only tracks the allegations.

GCC/IBT negotiator Caruso, by his objective words and actions, kept open the door to a new CBA without binding, third party arbitration. Mr. Caruso stated that GCC/IBT had not taken the position that there was no way GCC/IBT would sign a contract without third party arbitration; in fact, Mr. Caruso stated that if GCC/IBT ever reached that point, it would tell the *News-Press*. (Tr. 2575; RESP. 407). At no point did GCC/IBT take a final position. (Tr. 2033, 2484, 2566).

[29] Significantly, in that CBA, the union agreed to a no-strike clause, as well.

Binding, third party arbitration is a mandatory subject of bargaining. *NLRB v. Independent Stave Co.*, 591 F.2d 443 (8th Cir. 1979), cert. denied 444 U.S. 829 (1979). Neither GCC/IBT, nor the *News-Press*, made a final offer with respect to a grievance procedure. Witnesses for both parties testified at the hearing that all unresolved bargaining subjects remain open for negotiation. (Tr. 2033, 2484, 2526, 2554-55, 2566). The allegations concerning the grievance procedure proposal of *Santa Barbara News-Press* should be dismissed in their entirety.

E. THE *NEWS-PRESS* LAWFULLY NEGOTIATED A BULLETIN BOARD PROPOSAL THAT WAS NEITHER INSISTED UPON NOR PREDICTABLY UNACCEPTABLE

1. FACTUAL BACKGROUND

GCC/IBT's initial bulletin board proposal stated:

> *Santa Barbara News-Press* will designate an area frequently accessed in the newsroom for an enclosed bulletin board to be used by the union.

(G.C. 18 at 19).

On November 14, 2007, the *News-Press* responded, explaining "with the respect to the request for a union bulletin board, we will make a separate, specific proposal." (G.C. 307 at 5). Later, at the November 14, 2007 negotiations, GCC/IBT stated that it would provide the *News-Press* a separate, discreet proposal regarding a bulletin board. (RESP. 347 at 7).

On November 21, 2007, GCC/IBT sent a letter purportedly enclosing a proposal. (G.C. 26). That same day, the *News-Press* wrote back and stated that there was no bulletin board proposal enclosed with the letter. (G.C. 27). Later that day, GCC/IBT faxed the bulletin board proposal that stated:

> The Employer will provide Newsroom Employees with an enclosed, securable Employee Bulletin Board to be placed in a convenient location in the Newsroom

> for Employee and Official Union Notices. **The Shop Steward shall have a key to the bulletin board for the purpose of posting and removing posted material.**

(G.C. 28 at 2)(emphasis added).

In response, on February 14, 2008, the *News-Press* made the following counter-proposal:

> The Company agrees to provide a glass-enclosed bulletin board to be placed in the Newsroom at a location selected by the Company, which may be used by the Union for posting notices approved by the Company and restricted to:
>
> (a) Notices of Union meetings.
>
> (b) Notice of Union elections.
>
> (c) Notices of Union appointments and the results of Union elections.
>
> (d) Other Notices concerning bona fide Union activities, such as: cooperatives, credit unions, and unemployment compensation information.
>
> Before any notice is posted, it must be presented to the Publisher. The Publisher agrees that he will not unreasonably withhold approval and will not unreasonably delay the approval process.
>
> There shall be no other general distribution or posting by employees or the Union of any kind of literature upon Company proper other than as herein provided or as permitted by law.

(G.C. 332; RESP. 407).

At negotiations on February 15, 2008, the parties discussed the company's proposal. (RESP. 421). Significantly, GCC/IBT expressed understanding that the *News-Press* would have concerns about postings that were derogatory or inflammatory. (*Id*). Given the history of offensive remarks made about the *News-Press* in general, and the co-publishers in particular, GCC/IBT's statement was prudent.

The *News-Press* made the point that it thought its bulletin board proposal was reasonable. The *News-Press* told GCC/IBT that it had given much consideration to the proposed language and thought it was a good proposal; many contracts did not even provide for a bulletin board for

the union. Caruso responded that GCC/IBT would be making a counter-proposal. (RESP. 421; Tr. 2547-48).

Later in the day on February 15, 2008, GCC/IBT made a counter-proposal. The proposal stated:

> The Employer will provide Newsroom employees with an enclosed, secure employee bulletin board of reasonable size to placed in a convenient location in the Newsroom for official Union notices.
>
> The purpose of the bulletin board shall be for the use of the Union and its Members to post notices as determined appropriate by authorized Union Officials. There shall be no derogatory, inflammatory or other inappropriate postings.
>
> The Shop Steward shall have a key to the bulletin board for the purpose of posting and removing posted material.

(G.C. 343).

As Mr. Caruso presented GCC/IBT's proposal, he paused and said, "You may have a legitimate concern." (RESP. 421). He asked for a short caucus and stepped out of the room. (*Id*). When he came back, he said GCC/IBT was going to modify their language to provide that the supervisor, as well as the Union Steward, would have a key to the glass-enclosed bulletin board. (Tr. 2548; *Id*). Caruso said words to the effect, "If we are going to say you trust us, we need to trust you as well." (RESP. 421, pg. 3; Tr. 2548).

As promised on February 15, 2008, GCC/IBT made another proposal on bulletin boards on February 25, 2008, which stated:

> The Employer will provide Newsroom employees with an enclosed, secure employee bulletin board of reasonable size to placed in a convenient location in the Newsroom for official Union notices.
>
> The purpose of the bulletin board shall be for the use of the Union and its Members to post notices as determined appropriate by authorized Union Officials. There shall be no derogatory, inflammatory or other inappropriate postings.

> The Shop Steward and Newsroom Manager shall have a key to the bulletin board for the purpose of posting and removing posted material.

(G.C. 351) (underline in original). (RESP. 437).

The next day, February 26, 2008, the parties discussed the GCC/IBT's bulletin board proposal of February 25, 2008. (Tr. 2551-52). This discussion occurred between 9:30 a.m. and 10:10 a.m. (RESP. 440). Mr. Caruso, in explaining his proposal, made it clear that he understood that a supervisor could take something down from the bulletin board that was objectionable; GCC/IBT would deal with it by grieving it. With respect to posting materials on the bulletin board, Mr. Caruso said it was his intent that supervisors would not be posting anything they wanted on the bulletin board. (RESP. 440, pg. 2).

Later that same day, GCC/IBT made a new bulletin board proposal, which was regressive. (G.C. 355; Tr. 2552-53). The new proposal specifically deleted the phrase, "for the purpose or posting and removing posted material." This was totally at odds with Caruso's explanation of the previous proposal, that he was providing for management to remove objectionable materials from the board and the Union would grieve it later.

On April 3, 2008, the company made a counter-proposal on the bulletin board that stated:

> The Company agrees to provide a glass-enclosed bulletin board to be placed in the Newsroom at a location selected by the Company, which may be used by the Union for posting notices approved by the Company and restricted to:
>
> (a) Notices of Union meetings.
>
> (b) Notice of Union elections.
>
> (c) Notices of Union appointments and the results of Union elections.
>
> (d) Other Notices concerning bona fide Union activities, such as: cooperatives, credit unions, and unemployment compensation information.
>
> Before any notice is posted, it must be presented to the Publisher. The Publisher agrees that he will not unreasonably withhold approval and will not unreasonably

> delay the approval process. ***The Shop Steward and the Associate Editor shall have keys to the bulletin board for the purpose of posting and removing posted material.***
>
> There shall be no other general distribution or posting by employees or the Union of any kind of literature upon Company proper other than as herein provided or as permitted by law.

(G.C. 370)(emphasis in original); (RESP. 471; TR. 2553). Additionally, the *News-Press* included the following bargaining note:

> This is in response to the Union's February 26, 2008 proposal. The addition that is in bold above is similar to a previous Union Proposal. The Union's February 26, 2008 proposal was ***regressive***, in that it deleted the phrase "for the purpose of posting and removing posted material from its previous Proposal.

(*Id*)(emphasis added).

On October 23, 2008, and again on February 25, 2009, the *News-Press*, as part of comprehensive proposals, re-proposed its April 3, 2008 proposal. (G.C. 428 at 30 and G.C. 442 at 29, respectively).

2. ARGUMENT

The paucity of the ALJ's analysis regarding the bulletin board was telling. The ALJ concluded that the *News-Press*'s proposal to approve postings prior to posting in the bulletin board were "demeaning and condescending," (ALJD 128:45), but there was no record evidence to support this notion. In fact, GCC/IBT negotiator Caruso described the matter as one of "trust," stating that if the company was going to trust GCC/IBT, GCC/IBT had to trust the *News-Press* as well. (RESP. 421, pg. 3; Tr. 2548). And, given the admitted insulting and demeaning statements made by GCC/IBT and former employees regarding the *News-Press*, Caruso acknowledged the *News-Press*'s valid concern in desiring to pre-approve postings. (RESP. 421, pg. 3, Tr. 1201-04, 1970). Further, the ALJ only told half the story with respect to the bulletin board explaining that GCC/IBT proposed that the *News-Press* have a key to the bulletin board, but inexplicably omitting the fact that GCC/IBT engaged in regressive bargaining by

withdrawing that language, and that the *News-Press* proposed the very same language as GCC/IBT, in this regard. (ALJD 129:10-14; GC 355; Tr. 2552-53; GC 370; RESP 471). This conspicuous omission confounded the record and constituted error.

The *News-Press* had a legitimate interest to make sure that it was not libeled in its own facility. GCC/IBT recognized this concern. Thereafter, GCC/IBT withdrew its proposal that the *News-Press* have a key to the bulletin board to remove offensive postings. The pre-approval process was never a point of contention as GCC/IBT stated that if something was not posted, it would just grieve it. (RESP 440). The ALJ's Decision stands on a pillar of sand. This allegation should be dismissed.

There was nothing "predictably unacceptable" about the *News-Press*'s Bulletin Board Proposal. The *News-Press* made its proposal on the bulletin board in good faith. Counsel to the *News-Press* was familiar with other CBAs where almost the exact same language had been accepted by other unions, including GCC/IBT. (RESP. 1056(*Beaver County Times*), 1057(Pacific Publishing Co.), 1059(*Bucks County Courier Times*) at 6, RESP. 1061(*Richmond Times-Dispatch*) at 33). In particular, the *News-Press* proposed its bulletin board language because it had ***previously*** been agreed to by the United Steelworkers of America at another newspaper during its negotiations. (RESP. 1056; Tr. 2548). The *News-Press* made the proposal in good faith. The *News-Press* explained that its bulletin board proposal was predicated, in part, on having the ability to protect itself from disparaging postings. (Tr. 2548). This was because GCC/IBT has a history of published disparagement of both the *News-Press* in general and the owner, in particular. (Tr. 1201-04). GCC/IBT candidly acknowledged that the *News-Press* would rightly have concerns about postings that were derogatory or inflammatory. (Tr. 1970).

The irony of this allegation was that the *News-Press* was charged with bad faith bargaining when it was GCC/IBT that engaged in regressive bargaining by removing, from the

proposal, the *News-Press*'s ability to remove inflammatory or disparaging language. (Compare G.C. 351 and G.C. 355).

Furthermore, there was no evidence that the *News-Press* or GCC/IBT took a final position with respect to the bulletin board proposal. Neither GCC/IBT nor the *News-Press* insisted on a proposal with respect to the bulletin board or declared impasse on this issue. (Tr. 2033, 2484). The record in this case does not support the allegation that the *News-Press* unlawfully insisted upon the bulletin board proposal. This allegation should be dismissed.

F. THE *NEWS-PRESS* LAWFULLY PROPOSED A DISCIPLINE AND DISCHARGE CLAUSE THAT WAS NEITHER INSISTED-UPON NOR "PREDICTABLY UNACCEPTABLE"

1. FACTS

In GCC/IBT's opening proposal, it proposed a clause entitled "Disciplinary Action" (G.C. 18 at 14). From the onset of negotiations, GCC/IBT attempted to negotiate contract language that gave it and the employees control over the content of the newspaper. This started in GCC/IBT's opening proposal. (G.C. 18). GCC/IBT proposed that the *News-Press* "reserved" its right to discipline, suspend, or discharge any employee for just cause in Section 3. (*Id*).

In response, on November 14, 2007, the *News-Press* provided a counter-proposal. (G.C. 304). In that proposal, the *News-Press* explained, "while the policy of the Employer is at-will employment, the Employer wishes to communicate that it will impose discipline or discharge for the following types of misconduct …" and listed various grounds for discipline in Section 3. (*Id*).

The parties had considerable discussion of the *News-Press*'s Discipline and Discharge proposal at the bargaining session of February 12, 2008. (Tr. 2562; RESP. 395, pg. 3-6). The discussion focused largely on Section 3 and 4 of the proposal. GCC/IBT had no problem with many of the listed types of misconduct in Section 3. (Tr. 2568). However, consistent with GCC/IBT's goal to control the content of the newspaper, it was very opposed to Section 3(a) –

"biased reporting." GCC/IBT chief negotiator Caruso said it did not belong. He stated that reporting is "always from your perspective."[30] (Tr. 2562; RESP. 395, pg. 4). GCC/IBT's primary objection was the absence of a "just cause" standard. Mr. Caruso said "at-will" is not going to "fly" and that GCC/IBT ***must*** have just cause. (RESP. 395). With respect to the discussion of Section 4 (expectation of privacy), GCC/IBT said it would make a counter proposal to that section. (*Id*).

On February 25, 2008, the parties discussed the discipline and discharge clause further. (Tr. 2576). In particular, the parties discussed the *News-Press*'s proposal that disloyalty be considered misconduct. (RESP. 437 at 2). Mr. Caruso said disloyalty may be acceptable – if it was defined and there was a just cause standard. (*Id*). However, GCC/IBT took the position that there were two obstacles to progress on the negotiation front: arbitration and just cause. (*Id*). GCC/IBT took the position that both issues needed to be in a CBA. (*Id*).

On February 26, 2008, GCC/IBT made a new discipline and discharge proposal that contained a ***fixed***, progressive discipline system. (G.C. 353). The proposal contained very limited reasons for the *News-Press* to be able to discipline or discharge employees in comparison to the *News-Press*'s proposal. The *News-Press* explained that GCC/IBT's proposal failed to address many of the issues proposed by the *News-Press* in its November 14, 2007 proposal. (RESP. 440 at 2).

At the end of the bargaining session of February 26, 2008, the *News-Press* responded to GCC/IBT's discipline and discharge proposal with a written position statement. (G.C. 358). The *News-Press* explained:

> Today the Union gave the company a new proposal addressing the subject of Discipline and Discharge, replacing its proposal on Discipline at page 13 of its

[30] This was quite the curious statement as Caruso had never negotiated a newsroom contract prior to the instant case. (Tr. 2103).

Initial Proposal. After review of the proposal, Santa *Barbara News-Press* finds it objectionable for the following reasons:

1. *Santa Barbara News-Press* continues to propose at will employment instead of a just cause standard.

2. *Santa Barbara News-Press* opposes the concept of fixed progressive discipline. Rather, *Santa Barbara News-Press* believes that management should be able to determine the amount of discipline in the context of the facts and circumstances of each situation. For example, using the facts from an actual case, an Employer was presented with a situation where an employee, in front of others, called his supervisor "a bastard, red neck, son of a bitch." Under the Union's proposal we would be required to give that individual a verbal warning that would be documented in writing. In the actual case, the Employer discharged that employee for that egregious, insubordinate outburst directed at management. Management's decision was upheld. This is just one example. However, under the Union's proposal that employee would have had two more chances to be abusive. That makes no sense to *Santa Barbara News-Press*.

3. The Union's proposal adopts the language of Section 2 of the Company's Counter Proposal No. 4; however, it takes it away with the second sentence that reads: "Disciplinary action shall be applied in a uniform and non-discriminatory manner." The whole purpose of the Company's proposal was to give it flexibility to be lenient in particular circumstances, without being required to be lenient in all circumstances. If the Union ever believes that the Company has been discriminatory for a reason that violates a statute, its statutory remedies are always available to it.

4. The Union's proposal does not address many of the types of misconduct listed in the Company's proposal. Is the union communicating that it does not believe those items constitute misconduct?

   As we all know, *Santa Barbara News-Press* feels very strongly about biased reporting. *Santa Barbara News-Press* certainly believes that biased reporting is conduct for which an individual can be discharged. The editorial integrity of the *Santa Barbara News-Press* goes to the core of its entrepreneurial control. To preserve that integrity, one of the things it must be able to do is eliminate biased reporting.

   Disloyalty is unquestionably misconduct for which an individual can be discharged. The U.S. Supreme Court has so ruled.

   Dishonesty seems so basic. Why has the Union not addressed dishonesty? Without addressing in this document every point in Company Counter Proposal No. 4, we would like to hear reasons from the Union as to why it did not address those items.

> The Union's proposal did not address Section 4 of the Company's proposal dealing with the expectation of privacy in the workplace. We thought the Union had intended to address this.

(G.C. 358).

In response, on February 27, 2008, GCC/IBT presented its response to the *News-Press* February 26, 2008, written position. (G.C. 360). When GCC/IBT presented this response, it appeared angry. (RESP. 449).

On March 3, 2008, the *News-Press* sent GCC/IBT a letter in response to GCC/IBT's February 27, 2008 response. (G.C. 45). In the letter, the *News-Press* inquired of GCC/IBT what was the accepted industrial or legal interpretation for the term misconduct; what items GCC/IBT considered "obsessive;" and whether GCC/IBT was planning to make a proposal on the expectation of privacy issue. (G.C. 45).

In response, on March 25, 2008, GCC/IBT indicated that the issues would be discussed when the parties next met. (G.C. 47). Mr. Caruso further said he would discuss privacy language with his committee. (G.C. 47).

On April 2, 2008, GCC/IBT proposed to move a section contained in the *News-Press*'s proposal on discipline and discharge into the management rights clause, specifically Section 4, dealing with expectation of privacy. (G.C. 366). Again, at negotiations, Caruso stated that he saw the three core issues as discipline and discharge, grievance/arbitration and management rights, and that he was not so concerned about management rights if he "got" discipline and discharge plus grievance and arbitration. (Tr. 2513; RESP. 459). Caruso further stated that the union needed "the company to agree to a concept of just cause as well as an outside arbitrator." Mr. Caruso said the *News-Press* had to agree to these concepts just to acknowledge GCC/IBT's presence. (*Id*). Furthermore, Caruso expressed the opinion that he believed both GCC/IBT and

the *News-Press* were negotiating in a good faith effort to reach an overall contract. (*Id*).

On April 3, 2008, GCC/IBT criticized the *News-Press*'s proposals for lacking just cause and arbitration. (RESP. 471). Significantly, the *News-Press* told GCC/IBT that subjective "like or dislike" of the *News-Press*'s proposal was not a standard; rather, the issue was whether the parties had the right to make the proposals. (RESP. 471). The *News-Press* admonished GCC/IBT for disparaging the company's right to make proposals, pointing out that the company had not disparaged GCC/IBT's right to make proposals so long as it avoided permissive, non-mandatory subjects of bargaining. (*Id*).

On April 3, 2008, the *News-Press* also provided a counter-proposal with respect to GCC/IBT's proposal regarding expectation of privacy. (G.C. 372). The *News-Press* expressed no objection to including its proposal in the management rights article rather than the discipline and discharge clause. (*Id*).

By a letter dated May 9, 2008, the *News-Press* addressed several points, including proposals for "just cause" and arbitration:

> However, as you acknowledged at the table, grievance and arbitration is a mandatory subject of bargaining, and the *Santa Barbara News-Press* has the right to propose a procedure that does not contain concepts of "just cause" or binding arbitration. Even you acknowledged awareness of collective bargaining agreements without arbitration in them. Your statements reflect a belief and/or position that by virtue of the union being certified, that translates into a requirement that an employer agree to what you want. That is not the law. From the point-of-view of *Santa Barbara News-Press*, the existing wages, hours and working conditions are very generous. Therefore, proposing the status quo on such items is certainly consistent with good faith. "Predictably unacceptable" is not a standard under the National Labor Relations Act. If that were the case, either party could unilaterally adopt fixed positions and then announce that any proposals from the other side that do not adopt those positions are predictably unacceptable. As we have stated to the union at the bargaining table, we do not disparage your right to make proposals on mandatory subjects. I sincerely wish you would accord us the same respect.

(G.C. 54).

On May 14, 2008, GCC/IBT made another proposal on discipline and discharge. (G.C. 375). GCC/IBT modified its proposal, eliminating a fixed disciplinary progression previously proposed; additionally, GCC/IBT added "dishonesty" as a reason for discipline or discharge. (G.C. 375).

At bargaining on February 26, 2009, the *News-Press* presented GCC/IBT with written bargaining agenda items. Agenda item number 2, Discipline and Discharge, stated:

> We have made proposals to the union on this subject matter on November 14, 2007, and April 3, 2008. Most of the conversation has focused on the fact that the *Santa Barbara News-Press* proposal does not provide that discipline and discharge shall be for "just cause." Set aside for the moment the concept of just cause. Does the union agree that the listed types of misconduct in Section 3(a) through (t) would be just cause for discipline or discharge under its proposed concept of just cause?

(G.C. 446).

After caucusing for about an hour and 40 minutes, Mr. Caruso strongly objected to "biased reporting" as cause for discipline or discharge. Consistent with GCC/IBT's continuing theme to allow the reporters to control the content of the paper, Caruso stated that firing somebody for biased reporting was inflammatory in this situation. (RESP. 630). Other than subsection (a)(biased reporting), Mr. Caruso stated that most of the listed types of misconduct in the Company proposal could be just cause under GCC/IBT's proposal. (*Id*). He said under GCC/IBT's proposal, he thought most of them would be examples of just cause for discipline or discharge. (RESP. 630, pg. 2; Tr. 2566; G.C. 446).

The subject of just cause and binding arbitration arose again in the parties' April 21, 2009, bargaining session. (RESP. 646; Tr. 2533). At approximately 3:35 p.m. on that day Federal Mediator Jim Rucks informed the *News-Press* negotiating team (Travis Armstrong and Michael Zinser) that if the *News-Press* would agree to "just cause" as a standard in discipline and

discharge and third party, binding arbitration, all of the union economic proposals would fall by the wayside. (Tr. 2533). Commissioner Rucks specifically stated that Nicholas Caruso authorized him to communicate that to the *News-Press* bargaining team. (RESP. 646 at pg. 3).

On October 23, 2008, the *News-Press* presented a comprehensive proposal that reiterated its April 3, 2008 counter-proposal on discipline and discharge. (G.C. 428 at 7-8). On February 25, 2009, the *News-Press* presented another comprehensive proposal that again reiterated its discipline and discharge proposal. (G.C. 442 at 7-8).

2. ARGUMENT

a) The ALJ Erred in His Analysis

Curiously, the ALJ recognized that the *News-Press* could have "a strong need to retain essentially total control over the employee relationships," and that fact would "not (be) inconsistent with [the *News-Press*]'s effort to reach an agreement which would maintain [the *News-Press*]'s control of the employees." (ALJD 137:29-32). In spite of this conclusion the ALJ reasoned that a discipline and discharge proposal where the *News-Press* had final decision-making authority violated the Act. This finding constituted error.

There is no provision in the Act or any precedent to support the notion that an employer cannot bargain a strong discipline and discharge clause of a contract. The ALJ offered rhetoric, rather than fact, to opine that the discipline and discharge proposal of the *News-Press* would somehow leave employees in a worse off position than if the union did not agree to it. (ALJD 141:8-11). The ALJ waxed poetic that the *News-Press* was seeking to achieve a "pre-representational" dynamic in the newsroom; the record had no evidence to support such a conclusion. The ALJ voiced extreme hostility to the notion that the *News-Press* would maintain control of its workforce using words like "absolute power" to inject an emotional quality to his decision. (ALJD 140:47-49). There was nothing regressive even alleged about the *News-Press*'s

proposals, yet the ALJ tacitly concluded so. (ALJD 142:26-30) (describing the "general revanchist nature of the *News-Press*'s proposals").

In fact, the ALJ acknowledged the weakness of his findings by finding that there was no "procedural violations with respect to bargaining." (ALJD 142:39-44). Instead, the ALJ attempted to buttress his findings by concluding that the various non-bargaining 8(a)(1) and 8(a)(3) violations contained in his flawed Decision led him to the conclusion that the *News-Press* engaged in bad faith bargaining. (ALJD 143:12-15). In so doing the ALJ acknowledged that there was no record evidence to support his findings; instead he used unrelated evidence to support his conclusions.

b) The *News-Press's* Discipline and Discharge Proposal was Not "Predictably Unacceptable."

The *News-Press*'s discipline and discharge proposal was not predictably unacceptable. GCC/IBT, in another CBA, agreed to the very same at-will doctrine that Caruso professed as "unacceptable," "illegitimate," "restrictive," and "too rigid." *See Midwest Television, Inc.,* 349 NLRB 373 (2007); *Logesmann Bros*., 298 NLRB at 1020. Section 21 of the CBA between the *News-Press* Publishing Company in Fort Myers, Florida and GCC/IBT stated, in relevant part:

> **SECTON 21**
>
> The bargaining unit employee and the Publisher both have an equal right to terminate a bargaining unit employee's employment at any time. When possible and appropriate, a bargaining unit employee will be given the courtesy of advanced notice. Should a bargaining unit employee be laid-off, he/she will be first consideration to return to work if the Publisher later decides to hire for the position he/she held.

(G.C. 66 at 11).

The ALJ concluded that the same at-will status contained in a CBA negotiated and signed by GCC/IBT evidenced bad faith bargaining! ***The very same union that filed charges in the instant dispute agreed to the exact language the ALJ concluded violated the Act.*** There is no

rhyme or reason to this finding. This is legal adventurism run amok and certainly not a violation of the Act. GCC/IBT's contract in Fort Myers, Florida was an admission that at-will employment status could be achieved in a CBA with GCC/IBT. Far from violating the Act, the Fort Myers CBA reflects that, at some point, GCC/IBT will, in all likelihood, agree to a CBA in Santa Barbara that contains an at-will provision.

In *Midwest Televisions, Inc. d/b/a KFMB Stations*, 349 NLRB 373, 373, 384 (2007), the Board adopted the ALJ's finding that a company was not required to propose a "just cause" discharge standard, and that its "at-will" proposal was not evidence of bad faith bargaining. The Board adopted the following:

> Apparently the General Counsel argues that the Respondent should have proposed a "just cause" for discharge of employees not covered by a PSC, and its failure to do so is evidence of an intent not to reach an agreement.
>
> ****
>
> … indeed, "just cause" does not even seem an applicable test for these employees. Every member of the bargaining unit is "on the air talent" and therefore, to a large extent, whether a particular employee is doing his job to the satisfaction of management is a matter of subjective evaluation. Management might well determine to discharge a "talent" without there being traditional just cause.

349 NLRB at 384. In the instant case, given the *News-Press*'s explained concerns about bias, the rationale of *Midwest Televisions Inc.,* is particularly persuasive.

Furthermore, neither GCC/IBT nor the *News-Press* ever took a final position on discipline and discharge proposals. (Tr. 2032-33; 2484, 2566). GCC/IBT acknowledged that the majority of reasons set forth in the *News-Press*'s last proposal were legitimate, save GCC/IBT's position on biased reporting. (Tr. 2161-63). However, in at least one other CBA, a newsroom agreed that biased reporting was a legitimate reason for discipline. (RESP. 1052 at 10).

Thus, the ALJ found that although GCC/IBT already agreed to a CBA that contained at-will employment status for employees; although the Board explained that there is no obligation

to propose "just cause;" and although Caruso and Zinser both testified that neither the *News-Press* or GCC/IBT took a final position on discipline and discharge, somehow the evidence reflected that the *News- Press*'s proposal on discipline and discharge evidenced bad faith bargaining. This allegation has no merit and should be dismissed.

c) The *News-Press* Has Never Insisted as a Condition of Reaching an Overall Agreement that GCC/IBT Agree to a Management Rights clause "That Would Grant [The *News-Press*] Unilateral Control over Many Terms and Conditions of Employment"

Again, the ALJ opined that the *News-Press* insisted on a management rights clause. The evidence did not support such a conclusion, as explained above. Neither GCC/IBT nor the *News-Press* took a final position with respect to a management rights clause. (Tr. 2484, 2526).

Furthermore, the argument that the *News-Press* conditioned bargaining on a managements rights clause was sophistry. There was no evidence to suggest any conditional bargaining conditions. A management rights clause is a mandatory subject of bargaining. *See American Nat'l Ins. Co.*, supra. The *News-Press* had the right to propose a management rights clause, regardless of GCC/IBT's subjective desires. Remember, GCC/IBT initially proposed that the *News-Press* have no management rights and that internal union bylaws and practices trump any management prerogatives. (G.C. 18 at 20).

Caruso testified that GCC/IBT's real goal at negotiations was to obtain a contract that included just cause as well as a grievance and arbitration clause, and ***no management rights*** for the *News-Press*. (Tr. 2180). As evidence of GCC/IBT's unwillingness to agree to a management rights proposal, Caruso refused to initial off and tentatively agree on non-controversial sections of a management rights proposal that GCC/IBT proposed! (Tr. 2205; RESP. 1040).

The real tension between GCC/IBT's proposals and the *News-Press*'s proposals boiled down to who would control the content of the newspaper. The *News-Press* took the position that it had plenary control over the content of the newspaper. GCC/IBT consistently made proposals in an effort to undermine and contest the *News-Press*'s ability to control the content of the newspaper. (G.C. 18, 303; G.C. 342; G.C. 373; G.C. 404; G.C. 450; RESP. 651).

G. THE OVERALL CONDUCT OF THE *NEWS-PRESS* DEMONSTRATED GOOD FAITH BARGAINING

1. GCC/IBT'S BARGAINING CONDUCT FRUSTRATED NEGOTIATIONS.

GCC/IBT conditioned bargaining by attempting, as a term of employment, that employees and/or GCC/IBT be able to challenge – through protest; subjective determinations by employees; and grievance and arbitration – content decisions of the newspaper. GCC/IBT's proposals on management rights, discipline and discharge, and grievance and arbitration all combined to the limit the *News-Press*'s ability to control the content of the newspaper by transferring content decisions to employees and/or GCC/IBT, and, served to make the *News-Press*'s content decisions subject to grievance and arbitration.

This bargaining tactic was a stealth method of linking a permissive, non-mandatory subject of bargaining – control over the content of the newspaper – with mandatory subjects of bargaining. GCC/IBT's introduction, withdrawal, reintroduction, withdrawal, and second reintroduction of its Work Assignments/Employee Integrity proposal hampered the bargaining process, and stifled progress towards an overall agreement. (G.C. 18 at 3, G.C. 342, G.C. 367, RESP. 263, G.C. 373, G.C. 64, G.C. 404, G.C. 409, G.C. 84, RESP. 651, RESP. 652). Each time GCC/IBT appeared to concede, finally, that the *News-Press* had the ability to control the content of the newspaper, GCC/IBT reintroduced the same concept, that implicated the management rights, grievance and arbitration, and discipline and discharge proposals.

GCC/IBT conceded that the Work Assignments/Ethics proposals were permissive, non-mandatory subjects of bargaining. (Tr. 2069-73; 2121). GCC/IBT admitted that the design of the Work Assignments/Ethics proposals was to grieve and arbitrate content decisions of the *News-Press*. (Tr. 2138-39). GCC/IBT admitted that after the *News-Press* explained that GCC/IBT's Work Assignments/Ethics proposal was a permissive non-mandatory subject of bargaining over which the *News-Press* did not want to bargain, GCC/IBT re-proposed it. (Tr. 2062-63, 2065). GCC/IBT understood that its Work Assignments/Ethics proposal linked a permissive, non-mandatory subject of bargaining (Work Assignments/Ethics), with mandatory subjects of bargaining (management rights, grievance and arbitration; discipline and discharge), and that GCC/IBT's continued insistence on Work Assignments/Ethics prevented good faith negotiations on management rights, grievance and arbitration; and discipline and discharge. And in so doing, GCC/IBT violated its duty to bargain. *See Meda-Care Ambulance*, 285 NLRB 471, 471 (1987) ("It is a violation of the duty to bargain in good faith to hold negotiations hostage to demand for a non-mandatory subject." *Operating Engineers Local 542 (York County)*, 216 NLRB 408, 410 (1975) enfd 532 F.2d 902 (3rd Cir. 1976)*Operating Engineers Local 12 (AGC)*, 187 NLRB 430, 432 (1970)). Far from the *News-Press* being the bad actor in this play, GCC/IBT systematically blocked progress towards agreement by reintroducing proposals on a permissive subject of bargaining it knew to be predictably unacceptable – the employees and/or GCC/IBT controlling the content of the newspaper. GCC/IBT has "held negotiations hostage" through its insistence on bargaining over a permissive, non-mandatory subject of bargaining that the *News-Press* has demanded GCC/IBT remove from the table, and which frustrates negotiations on mandatory subjects of bargaining. In so doing, GCC/IBT engaged in bad faith bargaining.

2. COLLECTIVE BARGAINING IS NOT NECESSARILY A NEGOTIATION BETWEEN EQUALS

Collective bargaining, under the Act, does not guarantee that the negotiating parties have equal bargaining strengths. Similarly, it is not bad faith bargaining for a party to exercise its relative bargaining strength at negotiations. The U.S. Supreme Court explained, with respect to the collective bargaining process stated:

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results ***of*** thec ontest to the bargaining strengths ***of*** the parties. … The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is ***freedom of contract***. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based--private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970) (emphasis added). And at 109 (emphasis added). And:

> But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their ***economic position is weak***, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its ***economic strength*** to try to secure what it cannot obtain through bargaining. It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But ***it is the job of Congress***, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process. (emphasis added).

Id at 109 (emphasis added).

In *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74 (1991)(emphasis added) the Court again explained:

> The Government has generally regulated only "the ***process*** of collective bargaining," *H.K. Porter Co. v. NLRB,* 397 U.S. 99, 102, 90 S.Ct. 821, 823, 25 L.Ed.2d 146 (1970) (emphasis added), but relied on private negotiation between

> the parties to establish "their own charter for the ordering of industrial relations," *Teamsters v. Oliver,* 358 U.S. 283, 295, 79 S.Ct. 297, 304, 3 L.Ed.2d 312 (1959). As we stated in *NLRB v. Insurance Agents,* 361 U.S. 477, 488, 80 S.Ct. 419, 426, 4 L.Ed.2d 454 (1960), Congress "intended that the parties should have ***wide latitude in their negotiations***, unrestricted by any governmental power to regulate the substantive solution of their differences.

In *NLRB v. American Nat'l Ins. Co.,* 343 U.S. 395, 408-09 (1952) the Court stated:

> Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

In *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488-90 (1960) (emphasis added) the Court opined:

> Congress intended that the parties should have ***wide latitude in their negotiations,*** unrestricted by any governmental power to regulate the substantive solution of their differences…
>
> One writer recognizes this by describing economic force as 'a prime motive power for agreements in free collective bargaining.' Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, ***negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess***…For similar reasons, we think the Board's approach involves an intrusion into the substantive aspects of the bargaining process-again, unless there is some specific warrant for its condemnation of the precise tactics involved here.

And:

> [The Board] has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into the collective bargaining duty imposed by the Act. The Board's assertion of power under § 8(b)(3) allows it to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ, judging it on the very general standard of that section, not drafted with reference to specific forms of economic pressure. We have expressed our belief that this amounts to the Board's

> entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.

Id. at 497-98.

In *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965) (emphasis added) the Court explained:

> In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer ***'too much power.'*** In so doing, the Board has stretched ss 8(a)(1) and (3) far beyond their functions of protecting the rights of employee organization and collective bargaining. (emphasis added).

In *Lodge 76, IAM, AFL-CIO v. Wisc. Employment Relations Comm'n*, 427 U.S. 132, 149 (1976)(emphasis added) the Court wrote:

> But the ***economic weakness*** of the affected party cannot justify state aid contrary to federal law for, as we have developed, "the use of economic pressure by the parties to a labor dispute is not a grudging exception (under) . . . the (federal) Act; it is part and parcel of the process of collective bargaining. (emphasis added).

And, in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986)(emphasis added) the Court reiterated:

> Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left '***to be controlled by the free play of economic forces***.'

H. THE ACT DOES NOT SERVE TO WEAKEN THE *NEWS-PRESS*'S RELATIVE BARGAINING STRENGTH.

Hard bargaining is lawful. While an employer may not bargain with the intent of avoiding an agreement, an employer may engage in lawful hard bargaining by insisting to impasse on its proposals. *See Concrete Pipe & Products Corp*., 305 NLRB 152 (1991). "A party may stand firm by a bargaining proposal legitimately proffered." *Challenge-Cook Bros.*, 288 NLRB 387, 389 (1988). (citations omitted). A party has the right to test the bargaining strength of the other. *See Brink's USA*, 354 NLRB No. 41 slip op at 30 (July 1, 2009) (citing *Challenge-Cook Bros.*).

In the instant case, the *News-Press* has a sincere belief that it possesses superior bargaining strength to that of GCC/IBT. The Act permits the *News-Press* to test GCC/IBT's bargaining strength; the *News-Press* has done this just as much as GCC/IBT has tested the *News-Press*'s bargaining strength. The ALJ, however, used the Act to capriciously and arbitrarily reduce the *News-Press*'s relative bargaining strength by concluding that the *News-Press* did not bargain in good faith. (ALJD 143:42-45). Significantly, the ALJ did not rely on the *News-Press*'s proposals to reach this conclusion, rather he criticized the proposals for, in his view, failing to concede something. (ALJD 142:20-22). The ALJ disregarded Section 8(d) of the Act and punished the *News-Press* for having, and exercising its bargaining strength in negotiations.

In determining whether a party engaged in lawful hard bargaining, the Board considers the party's "overall conduct" both away from and at the bargaining table. *Atlanta Hilton & Tower*, 271 NLRB at 1603. In scrutinizing the overall conduct of the employer, that scrutiny "need not and does not mean that [the Board] choreograph[es] the dance," *Endo Laboratories, Inc.,* 239 NLRB 1074, 1076 (1978), by "impos[ing] upon the parties any bargaining format, either substantive or procedural." *Pease Co.,* 237 NLRB 1069, 1069 (1978) (finding good faith bargaining based on the totality of the circumstances). *See also St. George Warehouse, Inc.*, 349 NLRB 870, 872, 876 (2007) (Board dismissed surface bargaining allegation because of the totality of the company's conduct during negotiations; in addition, Board noted it should be "especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining")

There are several areas that should be scrutinized in evaluating the presence or absence of good faith bargaining. First, scrutiny is directed at the substance of proposals. *NLRB v. Mar-Len Cabinets, Inc.,* 659 F.2d 995, 999 (9th Cir. 1981). However, in doing so, what must not be overlooked is that the "Supreme Court made it clear that the … Act does not regulate substantive

terms with respect to wages and other terms and conditions of employment which are incorporated in a collective bargaining agreement." *Mgt. Training Corp*., 317 NLRB 1355, 1358 (1995). The Board does ***not*** scrutinize proposals to determine if they are "sufficiently generous," *Modern Mfg. Co.,* 292 NLRB 10, 10 (1988)(emphasis added), since bad faith is not demonstrated by a "failure to reach agreement or by a failure to yield to a position fairly maintained." *AMF Bowling Co., Inc. v. NLRB*, 63 F.3d 1293, 1301 (4th Cir. 1995); *Hamady Bros. Food Markets*, 275 NLRB 1335, 1337 (1985) (holding that firmness in insisting on a particular position that would reduce the employees' existing benefits is not bad faith). Any agreement must be a result of the parties' free will. *AMF Bowling Co.,* 63 F.3d at 1301.

The second area to which scrutiny is directed is the manner in which a party negotiates about proposals. *See Bridon Cortage, Inc.,* 329 NLRB 258, 265 (1999). Three important factors include the willingness of a party to modify or to discuss modifying or abandoning proposals, the willingness to explain reasons for proposals and bargaining positions, and the willingness to bargain about all subjects as opposed to attempting to bargain about a limited number of subjects before moving on to negotiations about other subjects. *Id.*

The third area of scrutiny is a party's overall approach to the bargaining process. *Id.*, citing *Genstar Stone Products*, 317 NLRB 1293 (1995). Such factors include whether one has been willing to meet at reasonable times and places, the degree to which a party "engaged in obstreperous conduct during the meetings to deter consensus," or engaged in frequent filibusters on important matters. *Id.* citing *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376 (8th Cir. 1993).The fourth area of scrutiny is a party's conduct away from the bargaining table. *Id.* However, unlawful conduct away from the bargaining table does not conclusively determine bad faith bargaining. *Id.* citing *Hostar Marine Transport Systems*, 298 NLRB 188 (1990).

Finally, both the *News-Press* and GCC/IBT have a duty to bargain in good faith, and the conduct of both parties must be examined. *Id.* at 9. Bad faith bargaining on the part of the GCC/IBT can "effectively excuse the [the *News-Press's*] obligation to bargain." *Id.* citing *Seafarers Local 777 (Yellow Cab Co.) v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978). A "union's bad faith bargaining can effectively obliterate 'the existence of a situation in which the employer's good faith could be tested.'." *Continental Nut Co.,* 195 NLRB 841, 845 (1972). Thus, "if it cannot be tested, its absence can hardly be found." *Times Publishing Co.,* 72 NLRB 676, 683 (1947), quoted with approval more recently, *Chicago Tribune Co.,* 304 NLRB 259, 260 (1991). *Id.* The *News-Press's* bargaining obligation is "to make ***some*** reasonable effort in ***some*** direction to compose [its] differences with [GCC/IBT]." *Atlanta Hilton & Tower*, 271 NLRB 1600,1603 (1984*).* The *News-Press* met this obligation. The *News-Press's* overall conduct in bargaining, including the substance of its proposals, its manner of negotiating, its overall approach to bargaining, and its other conduct, leads to the conclusion that, at most, the *News-Press* has engaged in lawful good faith bargaining. *See, e.g. Atlanta Hilton & Tower*, 271 NLRB at 1600; *see also Midwest Televisions, Inc. d/b/a KFMB Stations*, 349 NLRB at 373-74 (Board found no bad-faith bargaining with respect to proposals including a broad management rights clause, at-will employment, and grievance arbitration; Board also reversed ALJ's finding of a "predictably unacceptable" union security proposal because the company asserted a valid reason for its proposal and explained it to the union.).

I. THE BARGAINING CONDUCT OF THE *NEWS-PRESS* DID NOT VIOLATE THE ACT.

GCC/IBT was most vociferous about the parties' disagreement over whether or not to include just cause standards and third party binding arbitration in a new collective bargaining agreement. The *News-Press*, in good faith, rejected the union's proposals in this regard and dutifully answered any questions the union had about the Company's position.

In *NLRB v. Tomco Communications Inc.*, 567 F.2d 871 (9th Cir. 1978) the Ninth Circuit opined, in excruciating detail, why it denied the Board's Petition for Enforcement on a bad faith bargaining claim that was eerily similar to the instant case. The court did not mince words, explaining, early on in its decision:

> As we discuss at greater length below, [the Board's opinion that the company "was offering no major improvements in wages and working conditions"] betrays inappropriately partisan expectations. ***The right to union representation under the Act does not imply the right to a better deal. The proper role of the Board is to watch over the process, not guarantee the results, of collective bargaining***.

576 F.2d at 877 (emphasis added)(citing *H.K. Porter v. NLRB*, 397 U.S. 99, 109, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970)).

The court also corrected the Board's analysis regarding a management rights clause, thought to be indicative of bad faith bargaining. The court stated, with regard to the possibility of a "contractual waiver" in the context of a management rights clause:

> If the point is that the Union has a duty of representation to its members, which forbids it to concede certain prerogatives to management, and correspondingly forbids management to insist upon these prerogatives, we find the doctrine novel. The Board cites no statutory or case law in its support.
>
> Apparently, even the Board would not complain if there were "significant economic benefits to compensate for the (loss of representation rights during the contract term." (parenthetical an original, internal citations omitted). But if the only question is whether a waiver price is right, then the Board is again insinuating its judgment on the terms of an agreement that the parties themselves must reach.

567 F.2d at 878-79.

The *Tomco* decision also addressed arbitration and the inability of the parties to reach an agreement. The court explained that while an arbitration and no strike clause may be linked, they are not derivative clauses. The Ninth Circuit criticized this notion, stating:

> The Board reasons backward from the association of these terms, to argue that a no-strike clause is evidence of bad faith when, and to the extent that, the range of subjects on which employees may not strike is broader than that for which arbitration of grievances is available. We cannot agree that a no-strike clause has

> only derivative value. An agreement to arbitrate may be sufficient, but it is not necessary, consideration for an agreement not to strike.

567 F.2d at 879 (internal citations omitted).

Further, the court noted:

> It may be that most no-strike clauses are accompanied by arbitration provisions. It may be too, that if we were entitled to an opinion, which we are not, we would believe that arbitration would normally be a desirable adjunct of a commitment not to strike. ***These are matters for management and labor to resolve, if they can, at the bargaining table, if they cannot there be decided, then neither Board nor Court can compel an agreement or require a concession.*** We do not think that the Supreme Court held, or intended to hold, in *Lincoln Mills*, that a no-strike clause and an arbitration clause were so much one that a persistent demand for the one without acquiescing in the other is a refusal to bargain in good faith.

Id n. 6 (emphasis added)(quoting *NLRB v. Commerce-Graham Co.*, 279 F.2d 757, 759-60 (5th Cir. 1960)).

And, as relates to GCC/IBT's insistence on third party binding arbitration, the *Tomco* court had this to say:

> An employer may reasonably believe that labor disputes will be more easily settled at the first stage by direct contact between the aggrieved employee and his foreman than by the intervention of a union to represent the worker; that a shop steward committee of six is a cumbersome vehicle to represent a labor force of nine; and that the international representative of the union would be more skilled and professional in handling grievances than a member of the local union … the beliefs themselves, as embodied in the company's grievance and arbitration proposals, do not support a charge of bad faith in negotiations.

Id at 882.

In sum, the *Tomco* court derided the Board's finding of bad faith bargaining criticizing:

> A finding of bad faith would require the company to yield despite the Union's inability to enforce its will through the classic economic weapons of labor relations. But the obligation to bargain collectively, does not compel either party to agree to a proposal or require the making of a concession. (citations omitted). Nor may the Board, directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. "(internal citations omitted). While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the

> procedure alone, without any official compulsion over the actual terms of the contract.
>
> On the central issue of bargaining intent, the events in question resolve into a case of hard bargaining between two parties who are possessed of disparate economic power: a relatively weak Union and a relatively strong company. The company naturally wished to use its advantage to retain as many rights as possible. That desire is not inconsistent with its statutory duty to bargain in good faith.

Id at 884.

Precedent should be respected. The instant case was already decided in *Tomco*. The Agency would be well advised to remember the adage, "those who do not remember the past are doomed to repeat it." A "new spin" on an old principle does not defeat the established rule. The Board cannot inject itself into the substance of collective bargaining. Sadly this principle seems to have been ignored in the instant case. It is not too late to rectify this error and overturn the ALJ.

XII. THE GENERAL COUNSEL'S PROSECUTORIAL MISCONDUCT SERVES AS AN AFFIRMATIVE DEFENSE TO THE ALLEGATIONS

Regional Directors and the General Counsel are quasi-judicial officers who perform "administrative prosecutorial" functions. They issue direction of election in representation cases, and they authorize the issuance of complaints in unfair labor practice cases. Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *See Schweiker v. McClure*, 456 U.S. 188, 195,102 S.Ct. 1665, 72 L.Ed.2d 1 (1982). In this case, Regional Director McDermott and his subordinate Board Agents have failed to safeguard the *News-Press's* due process rights.

The Due Process Clause imposes limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). However, the General Counsel, through Region 31, showed little, if any, interest in protecting the *News-Press's* rights

and interests. The General Counsel, through Region 31, ran roughshod over the *News-Press*'s rights.

These allegations about the General Counsel are not made lightly, or filled with hyperbole. The General Counsel, through Region 31, has repeatedly ignored relevant evidence, prosecuted in the face of exculpatory evidence, was complicit in perpetrating a fraud upon the *News-Press*, and has been woefully partisan in its handling of charges and investigations involving the *News-Press*. This hearing was simply more of Region 31's nearly three year-long vendetta against the *News-Press*.

A. THE GENERAL COUNSEL SHOULD NOT HAVE ISSUED A COMPLAINT FOR ALLEGATIONS WHERE THERE WAS CLEAR EVIDENCE TO DEFEAT THE CLAIM.

In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. *See Dunlop v. Bachowski*, 421 U.S. 560, 567, n. 7, 568-574, 95 S.Ct. 1851, 1858, n. 7, 1858-1861, 44 L.Ed.2d 377 (1975); *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939).

The Board explained in *Electric By Miller*, 345 NLRB 1073, 1075 (2005), the standard for issuing a complaint:

> The General Counsel will be found to have acted with substantial justification in issuing a complaint whenever the General Counsel possesses, at the time the complaint is issued, evidence that could reasonably lead an administrative law judge to find a violation and ***does not possess evidence that clearly would defeat an allegation that the charged party has violated the law***.

(citing *Lion Uniform*, 285 NLRB 249, 254 fn. 33 (1987)). In *Electric By Miller*, the General Counsel withdrew an allegation that became part of an Equal Access to Justice Act claim. The Board adopted the ALJ's Recommended Decision and Order, which stated, in relevant part:

> The General Counsel's position with regard to the withdrawn allegations was substantially justified up until the witness who would testify in support of those allegations advised that he would not participate in the proceeding. The General Counsel acted with due diligence in withdrawing those allegations within 2 weeks of receiving the foregoing notification from the uncooperative witness which was more than a month before the scheduled hearing.

Id. at 1077. In essence, the General Counsel, in *Electric By Miller*, acted properly by withdrawing an allegation as soon as it was apparent that there was no evidence to support the allegation.

In the instant case, the General Counsel did not so act. In contrast to facts of *Electric By Miller*, the General Counsel continued, in malevolent fashion, to prosecute claims that the Region, during its investigation, revealed evidence that would defeat the allegations. In particular, the following allegations should not have been prosecuted:

B. ALLEGATIONS PREDICATED ON THE NOTION THAT THE *NEWS-PRESS* TRANSFERRED BARGAINING UNIT WORK TO FREELANCER ROBERT ERINGER (GC 1(FFFF) AT PARA. 11)

The General Counsel's own witnesses – Dawn Hobbs and Scott Hadley – testified that Mr. Eringer was not an investigative reporter (Tr. 749[31]), and that the Region did not ask either of them to review a single article written by Mr. Eringer or any freelancer (Tr. 745, 1249), before asserting that freelancers did not write investigatory stories. Ms. Hobbs even testified that she did not "have specialized expertise in investigative reporting" (Tr. 1219) and that "I did not claim I had an investigative reporting specialty. I do not consider myself an expert on the matter." (Tr. 1238).

[31] This was evidence adduced from the *Jencks* statement Mr. Hadley provided the Region on or about June 26, 2008. (Tr. 736).

C. ALLEGATIONS PREDICATED ON THE NOTION THAT THE *NEWS-PRESS* FAILED TO GRANT EMPLOYEES A MERIT WAGE INCREASE IN RECOGNITION OF WORK PERFORMED IN 2006, 2007, AND 2008 (GC 1(FFFF) AT PARAS. 12(A), (B) AND (C)

The Region, in its March 14, 2008 *prima facie* letter to the *News-Press* stated:

> Specifically, the Union's evidence indicates that the Employer had a past practice of giving employees annual performance evaluations towards the end of each year. Based on those performance evaluations, employees either received annual wage increases and/or one-time bonuses, which went into effect January of the following year. However, beginning in late 2006 and continuing to date the Employer discontinued this past practice. As a result, no employees have received annual wage increases and/or bonuses.

(GC 1(zzzz) at Ex. G). The Region ***admitted*** two facts that required dismissal pursuant to Section 10(b) of the Act. First, the Region admitted that the *News-Press* modified its past practice in "late 2006," even though GCC/IBT filed NLRB Charge No. 31-CA-28161 on February 20, 2008. (GC 1(o)). Second, the Region acknowledged that based on performance evaluations, employees "***either received annual wage increases and/or one-time bonuses which went into effect January of the next year.***" (GC 1(zzzz) at Ex. G). Yet, the General Counsel, through the Region, had already issued a complaint and prosecuted a charge regarding bonuses for 2006. (ALJ Ex. 61 at Ex. 2). This allegation should have been dismissed. It was misconduct to prosecute.

D. ALLEGATIONS PREDICATED ON THE NOTION THAT THE *NEWS-PRESS* ESTABLISHED A PRODUCTIVITY REQUIREMENT AT THE DECEMBER 3, 2008 MEETING (GC 1(FFFF) AT PARA. 16)

In advance of the hearing the Region knew, or should have known, that there was no evidence to support this allegation. Despite Ms. Hughes' claims of feeling as though she worked "more," Ms. Hughes worked a whopping one hour in overtime from December 3, 2008 through June 2009, yet missed an average of 3.4 hours per week due to vacation, illness, and to attend bargaining. Simply looking at Ms. Hughes' paychecks and timecards would have yielded this information.

E. ALLEGATIONS PREDICATED ON THE NOTION THAT THE *NEWS-PRESS* "INSTRUCTED EMPLOYEES NOT TO DISCUSS THEIR TERMS AND CONDITIONS OF EMPLOYMENT" AT THE DECEMBER 3, 2008 MEETING (GC 1(FFFF) AT PARA. 22)

The *News-Press* handbook clearly established a policy about divulging confidential material so that the *News-Press* maintained an advantage over its competitors. There was even an explicit disclaimer in the handbook that explained that employees were guaranteed the right to discuss their terms and conditions of employment with each other and their union. Further, the *News-Press*, in a December 19, 2008 letter to GCC/IBT Reiterated this right. (GC 103 at 3). In spite of the handbook and the December 19, 2008 letter, the General Counsel prosecuted. The General Counsel knew, or should have known, in advance of the hearing there was no evidence to support these allegations.

F. ALLEGATIONS PREDICATED ON THE NOTION THAT THE *NEWS-PRESS* TERMINATED DENNIS MORAN ON OR ABOUT AUGUST 30, 2008 IN VIOLATION OF SECTION 8(A)(1) OR (3) OF THE ACT

This allegation was extraordinary in light of the fact that the Region ***confirmed, roughly two weeks after Mr. Moran's discharge, that Blake Dorfman lied to the News-Press***, and knew that the *News-Press* relied on Mr. Dorfman's lie. That the General Counsel prosecuted this allegation was extraordinary. Model Rule 3.8(d) states:

Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

****

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

****

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and …

In addition, attached as **Appendix 2**, please find Formal Opinion 09-454 (July 8, 2009) of the American Bar Association Standing Committee on Ethics and Professional Responsibility that analyzed Model Rule 3.8(d). The actions – and inactions – of the General Counsel in prosecuting this case fell far short of what is expected of a prosecutor.

G. ALLEGATIONS PREDICATED ON THE NOTION THAT THE *NEWS-PRESS* "INSISTED" ON THE FOLLOWING PROPOSALS THAT WERE "PREDICTABLY UNACCEPTABLE" TO GCC/IBT (GC 1(FFFF) AT PARA. 20(B)): MANAGEMENT RIGHTS; GRIEVANCE AND ARBITRATION; UNION BULLETIN BOARD; AND DISCIPLINE AND DISCHARGE

The General Counsel knew, in advance of the hearing, that the *News-Press* had not insisted on any proposal and also knew that the *News-Press* had not declared impasse or implemented any proposals. Further, the notion that any of the four listed proposals were "predictably unacceptable" was pure, unadulterated, folly as GCC/IBT had, in other contracts, agreed to the very same language! And, the *News-Press* provided GCC/IBT with copies of its own contracts with the language! This allegation should never have been prosecuted.

H. ALLEGATIONS PREDICATED ON THE NOTION THAT THE *NEWS-PRESS* "INSISTED AS A CONDITION OF REACHING ANY COLLECTIVE BARGAINING AGREEMENT" THAT GCC/IBT AGREE TO A MANAGEMENT RIGHTS CLAUSE "THAT WOULD GRANT [THE *NEWS-PRESS*] UNILATERAL CONTROL OVER MANY TERMS AND CONDITIONS OF EMPLOYMENT." (GC 1(FFFF) AT PARA 20(B)(II).

Again, the General Counsel knew, or should have known, in advance of the hearing that the *News-Press* had not insisted on anything at negotiations, and had not conditioned an

agreement on anything, much less a management rights clause. The *News-Press* did not declare impasse and did not implement any proposals. There was no insistence, nor conditional bargaining. This allegation should never have been prosecuted, either.

CONCLUSION

WHEREFORE, for the reasons stated in this brief, and for any additional reasons deemed appropriate by Your Honor, the *News-Press* respectfully urges you to dismiss the Amended Consolidated Complaint for NLRB Cases Nos. 31-CA-28589; 31-CA-28661; 31-CA-28667; 31-CA-28700; 31-CA-28733; 31-CA-28738; 31-CA-28799; 31-CA-28889; 31-CA-28890; 31-CA-28944; 31-CA-29032; 31-CA-29076; 31-CA-29099; and 31-CA-29124.

DATED: September 23, 2010
Nashville, Tennessee

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that the foregoing POST-HEARING BRIEF was filed electronically with the NLRB Division of Judges and served this 23rd day of September, 2010, on the following, via email:

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APPENDIX 1

#	Date	Request(s)	Response(s)	Total Response Time	Charge Filed?
1	10/22/2007	Union's 59 Point Information Request (GC 15)	The next day, 10/23/07, SBNP Acknowledges of Receipt of Union's Request (GC 16). On 11/9/07, SBNP Provides a response (GC 19). Additionally, on 11/13/07, SBNP provides more documents responsive to 59 point request.	22 Days	No
2	11/13/2007	Union requests information re: employees from temp agencies	The next day, 11/14/07, SBNP gives list of employees from temp agencies at bargaining session.	1 Day	No
3	11/14/2007	Caruso verbally requests the exact ending date for the year-to-date 2007 wage information be provided.	On 2/15/08, SBNP presents document in response (RESP 891).	60 Days	No
4	11/16/2007	Gottleib requests additional information re: employees from temp agencies	On 1/23/08, SBNP Provides Supplemental Information Concerning Temporary Employees (GC 39).	67 Days	Yes
5	12/3/2007	Union Information Request Re: Temporary Employees (GC 29)	On 1/30/08, SBNP Again gives Union List of Temporary Employees with an update (GC 40).	68 Days	Yes
6	12/4/2007	Union Information Request Re: Bonuses and wage increases (GC 30)	On 12/10/08, SBNP acknowledges letter, will respond after 12/14/08 (GC 31). On 1/22/08, SBNP provides 2007 bonus information (GC 37). On 1/23/08, SBNP provides wage increase information (GC 38).	49 Days	No
7	2/13/2008	Caruso verbally requests summary plan description of long-term disability plan	The next day, 2/14/08, SBNP provides a copy (RESP 895).	1 Day	No
8	2/14/2008	Caruso verbally requests examples of ads placed by employees for a discount	On 2/15/08, SBNP presents document in response (RESP 893).	1 Day	No

9	2/21/2008	Union Request (dated 2/18/08) Re: Hours and Earnings (RESP 427, GC 42).	2/25/08, SBNP acknowledges the request and communicates that it's working on it (GC 43). On 2/26/08, SBNP provides response (RESP 251).	5 Days	No
10	2/27/2008	Caruso verbally requests summary plan description for vision care.	On 4/2/08, SBNP provides a document in response (RESP 1032).	35 Days	No
11	2/27/2008	Caruso verbally requests a full list of computer equipment.	On 4/2/08, SBNP provides a list (RESP 894).	35 Days	No
12	2/27/2008	Caruso verbally requests SBNP supplement RESP 251 with hours worked	On 4/2/08, SBNP provides a response (RESP 258).	35 Days	No
13	4/23/2008	Information Request Re: Procedure for Work Assignments; Lyn Ward; Arbitration (GC 51)	On 5/9/08, SBNP responds (GC 54).	17 Days	No
14	5/23/2008	Union Information Request Re: Hours and Earnings; Robert Eringer (GC 58).	On 6/11/08, SBNP responds in writing (GC 66) noting that SBNP had already provided on 4/2/2008 (RESP 258); Encloses Fort Myers News-Press Contract.	19 Days	No
15	7/10/2008	Verbal Union Information Request Re: Employee Roster	The next day, 7/11/08, SBNP provides response (RESP 544).	1 Day	No
16	7/11/2008	Verbal Union Request for Modification of RESP 258, seeking hours to be broken down into straight time and overtime.	SBNP Responds on 9/3/08 (GC 411).	53 Days	No
17	8/6/2008	Standing Information Request Re: Employee Status (GC 75)	10/22/08, SBNP responds (GC 420).	77 Days	Yes
18	9/9/2008	Standing Information Request Re: Employee Status (GC 84)	On 10/24/08, SBNP Replies to Union's Request (GC 89).	45 Days	Yes

19	12/1/2008	Information Request of Employee Status (GC 96).	On 12/12/08, SBNP responds to 12/1/08 & 12/4/08 letters, saying a response will come by 12/19 (GC 101). On 12/19, SBNP Reponds (GC 103)	18 Days	No
20	12/4/2008	On 12/4/08, Information Request Re: One Story Per Day (GC 99).	On 12/12/08, SBNP responds to 12/1/08 & 12/4/08 letters, saying a response will come by 12/19 (GC 101). On 12/19, SBNP Reponds (GC 103).	15 Days	No
21	12/11/2008	Caruso follows up his 12/1/08 & 12/4/08 requests (GC 100).	On 12/12/08, SBNP responds to 12/1/08 & 12/4/08 letters, saying a response will come by 12/19 (GC 101). On 12/19, SBNP Reponds (GC 103)	8 Days	No
22	1/6/2008	Caruso Request Concerning Kathy Pauls and Marci Wormser (GC 108)	On 1/14/09, SBNP Responds (GC 109); On 2/25/09, Wormser status is updated (GC 441).	8 Days	No
23	1/14/2009; 1/26/2009	Caruso verbally generally asks about Mineards in negotiation; Written Information Request Re: Mineards (GC 112)	On 2/9/2009, SBNP Responds to Request Re: Mineards (GC 113)	14 Days	Yes
24	2/13/2009	Information Request Re: Employment Status Changes (GC 115)	Ten Days Later, on 2/23/09, SBNP Reponds to Request (GC 116); 2/25/09 SBNP updates 2/23/09 letter with respect to Frank Newton (GC 441).	10 Days	No
25	2/25/2009	Caruso verbal request Concerning Angel Pacheco starting pay	On 2/26/09, SBNP responds (GC 444).	1 Day	No
26	3/11/2009	Request for Information on DeWitt Smith & Geroge Gelles (GC 120)	On 4/20/09, SBNP Responds to Request Re: DeWitt Smith & George Gelles (GC 122)	40 Days	No

APPENDIX 2

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-454 **July 8, 2009**

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.[1] Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,[2] which held that criminal defendants have a due process right to receive favorable information from the prosecution.[3] This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.[4] Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.[5] Finally, although courts

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] 373 U.S. 83 (1963). *See* State v. York, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

[3] *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

[4] *See* Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

[5] *See, e.g.*, Mastracchio v. Vose, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close

sometimes sanction prosecutors for violating disclosure obligations,[6] disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

> A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.[7] In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.[8] The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

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to violating [Rule 3.8]").

[6] *See, e.g.*, *In re* Jordan, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). *Cf.* Rule 3.8, cmt. [9] ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.")

[7] *See, e.g.,* Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35, United States v. Bagley, 473 U.S. 667, 674-75 (1985).

[8] "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.. . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); s*ee also* United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[9] Similarly, Comment [1] to Model Rule 3.8 states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*,[10] the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused.[11] This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.[12]

Over the course of more than 45 years following *Brady*, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors' disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,"[13] and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons."[14] A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited

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[9] Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

[10] Prior to *Brady*, prosecutors' disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. *See, e.g.*, Jencks v. United States, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" United States v. Andolschek, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) ("While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.")

[11] ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.")

[12] *See, e.g.*, OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), *see* MARU, *id*. at 330 – and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id*.

[13] Rule 3.8, cmt. [1].

[14] *Id*.

access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d)[15] establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.[16] The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.[17]

In particular, Rule 3.8(d) is more demanding than the constitutional case law,[18] in that it requires the disclosure of evidence or information favorable to the defense[19] without regard to the anticipated impact of the evidence or information on a trial's outcome.[20] The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[21]

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[15] For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

[16] This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

[17] The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id*. at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

[18] *See, e.g.*, United States v. Jones, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. *See In re* Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

[19] Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

[20] Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g.,* U.S. v. Barraza Cazares*,* 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

[21] *Cf.* Cone v. Bell, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g.*, Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.[22] Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence[23] or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."[24] Although "a lawyer cannot ignore the obvious,"[25] Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires

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[22] Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

[23] For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

[24] Rule 1.0(f).

[25] Rule 1.13, cmt. [3], *cf.* ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

prosecutors to disclose *known* evidence and information that is favorable to the accused,[26] it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.[27]

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.[28] Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.[29] Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case,[30] timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment.[31] Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order.[32]

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[26] If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

[27] Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

[28] *Compare* D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

[29] *See* ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

[30] In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel – that is, they provide access to all the documents in their case file including incriminating information – to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. *See* N.C. GEN. STAT. § 15A-903 (2007); *see generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

[31] *See* JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

[32] Rule 3.8, Comment [3].

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.[33] For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client[34] or another.[35] Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,[36] with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.[37]

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or

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[33] It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In United States v. Ruiz, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in Giglio v. United States, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

[34] *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

[35] *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

[36] *See* Rules 1.2(a) and 1.4(b).

[37] The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.[38]

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.[39] Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,[40] and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.[41] To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.[42]

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[38] The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

[41] Rule 5.1(c). *See, e.g.*, *In re* Myers, 584 S.E.2d 357, 360 (S.C. 2003).

[42] In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). *See, e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).